JACKSON LIBRARY - UNCG
3 0510 1583939 4

For Building Use Only

The Woman's College of
The University of North Carolina
LIBRARY

KFN
7445
N6
v.78

ANNOTATIONS INCLUDE 171 N. C.

NORTH CAROLINA REPORTS

VOL. 78

CASES ARGUED AND DETERMINED

Property of

IN THE NORTH CAROLINA COLLEGE FOR WOMEN LIBR

Greensboro, N. C.

SUPREME COURT

OF

NORTH CAROLINA

JANUARY TERM, 1878

BY

THOMAS S. KENAN

REPORTER

ANNOTATED BY

WALTER CLARK

(3D ANNO. ED.)

REPRINTED BY THE STATE
COMMERCIAL PRINTING COMPANY, PRINTERS AND BINDERS
RALEIGH
1916

KFN
7445
N6
V.78

CITATION OF REPORTS

Rule 62 of the Supreme Court is as follows:

Inasmuch as all the volumes of Reports prior to the 63d have been reprinted by the State, with the number of the volume instead of the name of the Reporter, counsel will cite the volumes prior to 63 N. C. as follows:

1 and 2 Martin, Taylor, and Conf.	as	1	N. C.
1 Haywood	"	2	"
2 Haywood	"	3	"
1 and 2 Car. Law Repository and N. C. Term	"	4	"
1 Murphey	"	5	"
2 Murphey	"	6	"
3 Murphey	"	7	"
1 Hawks	"	8	"
2 Hawks	"	9	"
3 Hawks	"	10	"
4 Hawks	"	11	"
1 Devereux Law	"	12	"
2 Devereux Law	"	13	"
3 Devereux Law	"	14	"
4 Devereux Law	"	15	"
1 Devereux Equity	"	16	"
2 Devereux Equity	"	17	"
1 Dev. and Bat. Law	"	18	"
2 Dev. and Bat. Law	"	19	"
3 and 4 Dev. and Bat. Law	"	20	"
1 Dev. and Bat. Eq.	"	21	"
2 Dev. and Bat. Eq.	"	22	"
1 Iredell Law	"	23	"
2 Iredell Law	"	24	"
3 Iredell Law	"	25	"
4 Iredell Law	"	26	"
5 Iredell Law	"	27	"
6 Iredell Law	"	28	"
7 Iredell Law	"	29	"
8 Iredell Law	as	30	N. C.
9 Iredell Law	"	31	"
10 Iredell Law	"	32	"
11 Iredell Law	"	33	"
12 Iredell Law	"	34	"
13 Iredell Law	"	35	"
1 Iredell Equity	"	36	"
2 Iredell Equity	"	37	"
3 Iredell Equity	"	38	"
4 Iredell Equity	"	39	"
5 Iredell Equity	"	40	"
6 Iredell Equity	"	41	"
7 Iredell Equity	"	42	"
8 Iredell Equity	"	43	"
Busbee Law	"	44	"
Busbee Equity	"	45	"
1 Jones Law	"	46	"
2 Jones Law	"	47	"
3 Jones Law	"	48	"
4 Jones Law	"	49	"
5 Jones Law	"	50	"
6 Jones Law	"	51	"
7 Jones Law	"	52	"
8 Jones Law	"	53	"
1 Jones Equity	"	54	"
2 Jones Equity	"	55	"
3 Jones Equity	"	56	"
4 Jones Equity	"	57	"
5 Jones Equity	"	58	"
6 Jones Equity	"	59	"
1 and 2 Winston	"	60	"
Phillips Law	"	61	"
Phillips Equity	"	62	"

In quoting from the *reprinted* Reports counsel will cite always the marginal (*i. e.*, the *original*) paging, except 1 N. C. and 20 N. C., which are repaged throughout, without marginal paging.

JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA

AT JANUARY TERM, 1878

CHIEF JUSTICE:

*WILLIAM N. H. SMITH.

ASSOCIATE JUSTICES:

EDWIN G. READE,
WILLIAM P. BYNUM,
WILLIAM B. RODMAN,
WILLIAM T. FAIRCLOTH.

ATTORNEY-GENERAL:

THOMAS S. KENAN.

CLERK OF THE SUPREME COURT:

WILLIAM H. BAGLEY.

---

*Appointed by Governor Vance, 14 January, 1878, *vice* Richmond M. Pearson, Deceased.

108050

JUDGES

OF THE

SUPERIOR COURTS OF NORTH CAROLINA

FIRST CLASS.

Name.	*District.*	*County.*
Mills L. Eure	First	Gates.
Aug. S. Seymour	Third	Craven.
Allmand A. McKoy	Fourth	Sampson.
Ralph P. Buxton	Fifth	Cumberland.
John Kerr	Seventh	Caswell.
David Schenck	Ninth	Lincoln.

SECOND CLASS.

William A. Moore	Second	Washington.
William R. Cox	Sixth	Wake.
John M. Cloud	Eighth	Surry.
David M. Furches	Tenth	Iredell.
James L. Henry	Eleventh	Buncombe.
Riley H. Cannon	Twelfth	Haywood.

SOLICITORS.

Name.	*District.*	*County.*
James P. Whedbee	First	Pasquotank.
Joseph J. Martin	Second	Martin.
Leonidas J. Moore	Third	Craven.
William S. Norment	Fourth	Robeson.
Samuel J. Pemberton	Fifth	Stanly.
Charles M. Cooke	Sixth	Franklin.
Fred. N. Strudwick	Seventh	Orange.
Joseph Dobson	Eighth	Surry.
William J. Montgomery	Ninth	Cabarrus.
William H. H. Cowles	Tenth	Wilkes.
James M. Gudger	Eleventh	Buncombe.
William L. Tate	Twelfth	Haywood.

JUDGES OF THE CRIMINAL COURTS.

Oliver P. Meares	Wilmington.
George V. Strong	Raleigh.

SOLICITORS.

Benjamin R. Moore	Wilmington.
Thomas P. Devereux	Raleigh.

LICENSED ATTORNEYS, JANUARY TERM, 1878

James Milton Brown ---------- Randolph.
William Grey Burkhead ---------- Wake.
William Willis Clark ---------- Craven.
John Devereux, Jr. ---------- Wake.
Sydney Robertson Dunn ---------- Cumberland.
Edward Crosby Hackney ---------- Chatham.
Sherwood Haywood ---------- Wake.
Charles Lee Heitman ---------- Davidson.
Samuel Melancthon Holton ---------- Guilford.
Tabitha Anne Holton* ---------- Guilford.
George Andrew Jones ---------- Macon.
Andrew Joyner ---------- Pitt.
William James Leary ---------- Chowan.
Clement Manly ---------- Craven.
Charles Henry Martin ---------- Franklin.
Alfred Meeks Moring ---------- Chatham.
Leander Slater Overman ---------- Rowan.
Henry Coleman Stevenson ---------- Craven.
John Benjamin Vines ---------- Edgecombe.
Wiley Wilburn Wilson ---------- Yancey.

*The first woman licensed to practice law in this State.

CASES REPORTED IN THIS VOLUME

A

	PAGE
Akin, Lyon v.	258
Alexander, Owens v.	1
Allen v. Chappell	238
Allison, Barringer v.	79
Allison v. Robinson	222
Anderson, Kahnweiler v.	133
Attorney-Gen. v. Simonton	57

B

Bank v. Green	247
Barden, Gulley v.	282
Barringer v. Allison	79
Bass v. Bass	374
Bernard v. Johnson	25
Blount v. Parker	128
Bowman, S. v.	509
Britt, S. v.	439
Brower, Taylor v.	8
Browning, S. v.	555
Brunhild v. Freeman	67
B. and L. Assn., Hanner v.	188
Bunting v. Jones	242

C

Canal Co., Williamson v.	156
Candler, Netherton v.	88
Cannady, S. v.	539
Caveness, S. v.	484
Chambers, Dobson v.	334
Chambers v. Penland	53
Chappell, Allen v.	238
Cherry v. Wilson	164, 166
Churchill, Miller v.	372
Clarke v. Wagner	367
Cloman v. Staton	235
Cobb v. Gray	94
Comrs. v. Magnin	181, 186
Cooley, S. v.	538
Crawley v. Woodfin	4
Crutchfield v. R. R.	300
Currie v. Kennedy	91

D

Dancy, S. v.	437
Davis v. McArthur	357
Davis, S. v.	433
Devereux v. Devereux	386
Dixon, S. v.	558
Dobson v. Chambers	334
Dobson v. Simonton	63
Doggett v. R. R.	305
Doughty v. R. R.	22
Driver, S. v.	423
Dunston, S. v.	418

E

Earp v. Richardson	277
Ellwood v. Plummer	392
England, S. v.	552
Erwin, Mabry v.	45

F

Faison v. Johnson	78
Farmer, Joyner v.	196
Farmer, Kull v.	339
Foster, Holmes v.	35
Freeman, Brunhild v.	67

G

Gatlin v. Tarboro	119
Gay v. Nash	100
Grantham, Lehman v.	115
Gray, Cobb v.	94
Green, Bank v.	247
Green v. Jones	265
Green, Suttle v.	76
Greensboro v. Shields	417
Gulley v. Barden	282

H

Hamlin, Neighbors v.	42
Hanner v. B. and L. Assn.	188
Harman, S. v.	515
Harris v. Harrison	202
Harris, Pepper v.	71
Henry, Rollins v.	342
Henry v. Smith	27
Holland, Phillips v.	31
Holmes v. Foster	35
Holmes v. Marshall	262
Holmes, Phillips v.	191
Houston v. McGowen	370
Houston, Simonton v.	408

I

Ingram, Mauney v.	96
Insurance Co., McCraw v.	149
Insurance Co., Sossaman v.	145

J

	PAGE
Jackson v. Maultsby	174
James, S. v.	455
Jaynes, S. v.	504
Jenkins, S. v.	478
Johnson, Bernard v.	25
Johnson, Faison v.	78
Jones, Bunting v.	242
Jones, Green v.	265
Jones, Mayo v.	402, 406
Jones v. Robinson	396
Jones, S. v.	420
Jones, Whissenhunt v.	361
Joyner v. Farmer	196

K

Kahnweiler v. Anderson	133
Katzenstein v. R. R.	286
Keesler, S. v.	469
Kennedy, Currie v.	91
Kirby v. Mills	124
Krider, S. v.	481
Kull v. Farmer	339

L

Lane v. Morton	7
Lane, S. v.	547
Laxton, S. v.	564
Lehman v. Grantham	115
Lewis v. Rountree	323
Liles, S. v.	496
Lilly v. Purcell	82
Lindsay v. Smith	328
Lindsey, S. v.	499
London v. Wilmington	109
Long, S. v.	571
Lyon v. Akin	258

M

Mabry v. Erwin	45
Macy, Welch v.	240
Magnin, Comrs. v.	181, 186
Marshall, Holmes v.	262
Mason, Pearce v.	37
Matthews, S. v.	523
Maultsby, Jackson v.	174
Mauney v. Ingram	96
Mayo v. Jones	402, 406
McArthur, Davis v.	357
McBryde v. Patterson	412
McCraw v. Insurance Co.	149
McGowen, Houston v.	370
Meacham, S. v.	477
Miller v. Churchill	372
Miller v. Miller	102
Mills, Kirby v.	124
Morris, Ritch v.	377
Morton, Lane v.	7
Munday, S. v.	460

N

Nash, Gay v.	100
Needham, S. v.	474
Neighbors v. Hamlin	42
Netherton v. Candler	88
Norris, S. v.	443
Nutt, Wilmington v.	177

O

Ober v. Smith	313
Owens v. Alexander	1

P

Paige v. Price	10
Parish, S. v.	492
Parker, Blount v.	128
Patterson, McBryde v.	412
Patterson, S. v.	470
Pearce v. Mason	37
Penland, Chambers v.	53
Pepper v. Harris	71
Perry v. Shepherd	83
Phillips, R. R. v.	49
Phillips v. Holland	31
Phillips v. Holmes	191
Phillips v. R. R.	294
Pickett, S. v.	458
Plummer, Ellwood v.	392
Prairie v. Worth	169
Price, Paige v.	10
Purcell, Lilly v.	82

R

Ramsay, S. v.	448
Rand v. Rand	12
R. R., Crutchfield v.	300
R. R., Doggett v.	305
R. R., Doughty v.	22
R. R., Katzenstein v.	286
R. R., Phillips v.	294
R. R., Sumner v.	289
R. R. v. Phillips	49
Reid, Spoon v.	244
Richardson, Earp v.	277
Ritch v. Morris	377
Robbins, S. v.	431
Robinson, Allison v.	222

PAGE

Robinson, Jones v. ---------- 396
Rollins v. Henry ---------- 342
Rountree, Lewis v. ---------- 323

S

Savage, S. v. ---------- 520
Shaft, S. v. ---------- 464
Shepherd, Perry v. ---------- 83
Shields, Greensboro v. ---------- 417
Simonton, Attorney-Gen. v. ---- 57
Simonton, Dobson v. ---------- 63
Simonton v. Houston ---------- 408
Smallwood, S. v. ---------- 560
Smith, Henry v. ---------- 27
Smith, Lindsay v. ---------- 328
Smith, Ober v. ---------- 313
Smith, S. v. ---------- 462
Sossaman v. Insurance Co.---- 145
Spoon v. Reid ---------- 244
S. v. Bowman ---------- 509
S. v. Britt ---------- 439
S. v. Browning ---------- 555
S. v. Cannady ---------- 539
S. v. Caveness ---------- 484
S. v. Cooley ---------- 538
S. v. Dancy ---------- 437
S. v. Davis ---------- 433
S. v. Dixon ---------- 558
S. v. Driver ---------- 423
S. v. Dunston ---------- 418
S. v. England ---------- 552
S. v. Harman ---------- 515
S. v. James ---------- 455
S. v. Jaynes ---------- 504
S. v. Jenkins ---------- 478
S. v. Jones ---------- 420
S. v. Keesler ---------- 469
S. v. Krider ---------- 481
S. v. Lane ---------- 547
S. v. Laxton ---------- 564
S. v. Liles ---------- 496
S. v. Lindsey ---------- 499

PAGE

S. v. Long ---------- 571
S. v. Matthews ---------- 523
S. v. Meacham ---------- 477
S. v. Munday ---------- 460
S. v. Needham ---------- 474
S. v. Norris ---------- 443
S. v. Parish ---------- 492
S. v. Patterson ---------- 470
S. v. Pickett ---------- 458
S. v. Ramsay ---------- 448
S. v. Robbins ---------- 431
S. v. Savage ---------- 520
S. v. Shaft ---------- 464
S. v. Smallwood ---------- 560
S. v. Smith ---------- 462
S. v. Tucker ---------- 545
Staton, Cloman v. ---------- 235
Steele v. Wood ---------- 365
Suit v. Suit ---------- 272
Sumner v. R. R. ---------- 289
Suttle v. Green ---------- 76

T

Tarboro, Gatlin v. ---------- 119
Taylor v. Brower ---------- 8
Thomas, Williams v. ---------- 47
Tucker, S. v. ---------- 545

W

Wagner, Clarke v. ---------- 367
Wallace, Williams v. ---------- 354
Welch v. Macy ---------- 240
Whissenhunt v. Jones ---------- 361
Williams v. Thomas ---------- 47
Williams v. Wallace ---------- 354
Williamson v. Canal Co. ------ 156
Wilmington, London v. ------- 109
Wilmington v. Nutt ---------- 177
Wilson, Cherry v. ----------164, 166
Wood, Steele v. ---------- 365
Woodfin, Crawley v. ---------- 4
Worth, Prairie v. ---------- 169

CASES CITED IN THIS VOLUME

A

Adams v. Reeves ---- 76 N. C., 412 ---- 79
Allen, Clerk's Office v. ---- 52 N. C., 156 ---- 176
Allen, S. v. ---- 24 N. C., 183 ---- 84
Alman, S. v. ---- 64 N. C., 364 ---- 550
Alexander, Fox v. ---- 36 N. C., 340 ---- 220
Alston, Arrington v. ---- 4 N. C., 727 ---- 415
Andrews v. Mulford ---- 2 N. C., 311 ---- 357
Angel, S. v. ---- 29 N. C., 27 ---- 438
Arrington v. Alston ---- 4 N. C., 727 ---- 415
Aston v. Galloway ---- 38 N. C., 126 ---- 389
Avery, *Ex Parte* ---- 64 N. C., 113 ---- 411

B

Baines v. Williams ---- 25 N. C., 481 ---- 131
Bank v. Williams ---- 24 N. C., 147 ---- 33
Barnes, Dunn v. ---- 73 N. C., 273 ---- 36, 338
Barnes v. Barnes ---- 53 N. C., 366 ---- 261
Barham, Smith v. ---- 17 N. C., 420 ---- 379
Barksdale, Owen v. ---- 30 N. C., 81 ---- 348
Barksdale, Bullard v. ---- 33 N. C., 461 ---- 360
Bartlett v. Simmons ---- 49 N. C., 295 ---- 357
Bateman v. Latham ---- 56 N. C., 35 ---- 227
Batts v. Winstead ---- 77 N. C., 238 ---- 132
Beatty, Heyer v. ---- 76 N. C., 28 ---- 8
Bell, Foye v. ---- 18 N. C., 475 ---- 215
Bennett, S. v. ---- 75 N. C., 305 ---- 442
Berrier, March v. ---- 41 N. C., 524 ---- 226
Biddle v. Carraway ---- 59 N. C., 95 ---- 389
Bishop, S. v. ---- 73 N. C., 45 ---- 554
Blakely v. Patrick ---- 67 N. C., 40 ---- 400
Bledsoe v. Nixon ---- 69 N. C., 81 ---- 28
Blount, Simpson v. ---- 14 N. C., 34 ---- 487
Blythe v. Lovingood ---- 24 N. C., 20 ---- 331
Bond, Tayloe v. ---- 45 N. C., 5 ---- 380
Bowden, Faison v. ---- 76 N. C., 425 ---- 126
Boykin v. Perry ---- 49 N. C., 325 ---- 487
Bradshaw v. Ellis ---- 22 N. C., 20 ---- 401
Brandon, S. v. ---- 53 N. C., 463 ---- 406
Brandon v. Phelps ---- 77 N. C., 44 ---- 338
Bray v. Lamb ---- 17 N. C., 372 ---- 389
Broadnax v. Groom ---- 64 N. C., 244 ---- 111
Brown, Jones v. ---- 67 N. C., 475 ---- 216
Brown, S. v. ---- 76 N. C., 222 ---- 436
Brumble v. Brown ---- 71 N. C., 513 ---- 218
Buie, Humphreys v. ---- 12 N. C., 378 ---- 81
Bullard v. Barksdale ---- 33 N. C., 461 ---- 360
Bumpass, Chambers v. ---- 72 N. C., 429 ---- 382
Bunting v. Gales ---- 77 N. C., 283 ---- 173
Burgwyn, Jacobs v. ---- 63 N. C., 196 ---- 347

Burton v. Wilkes ---------- 66 N. C., 604 ---------- 49
Burrows, S. v. ---------- 33 N. C., 477 ---------- 461
Bynum v. Carter ---------- 26 N. C., 310 ---------- 357

C

Cable v. Hardin ---------- 67 N. C., 472 ---------- 95
Cameron v. Campbell ---------- 10 N. C., 285 ---------- 180
Camp v. Smith ---------- 68 N. C., 537 ---------- 383
Campbell, Cameron v. ---------- 10 N. C., 285 ---------- 180
Carraway, Biddle v. ---------- 59 N. C., 95 ---------- 389
Carrier v. Hampton ---------- 33 N. C., 307 ---------- 350
Carrington, Clancy v. ---------- 14 N. C., 529 ---------- 213
Cartwright, Ehringhaus v. ---------- 30 N. C., 39 ---------- 416
Carson v. Mills ---------- 69 N. C., 32 ---------- 288
Carson v. Oates ---------- 64 N. C., 115 ---------- 17
Carter, Jones v. ---------- 73 N. C., 148 ---------- 364
Carter, Bynum v. ---------- 26 N. C., 310 ---------- 357
Castleberry, Green v. ---------- 77 N. C., 164 ---------- 268
Chambers v. Bumpass ---------- 72 N. C., 429 ---------- 382
Cheatham v. Hawkins ---------- 76 N. C., 335 ---------- 263
Cheek, Hardin v. ---------- 48 N. C., 135 ---------- 348
Clancy v. Carrington ---------- 14 N. C., 529 ---------- 213
Clancy v. Dickey ---------- 9 N. C., 497 ---------- 213
Clarke v. Wagner ---------- 74 N. C., 791 ---------- 368
Clarke, Commissioners v. ---------- 73 N. C., 255 ---------- 179
Clerk's Office v. Allen ---------- 52 N. C., 156 ---------- 176
Cobb, Loftin v. ---------- 46 N. C., 406 ---------- 357
Coble v. Fogleman ---------- 23 N. C., 440 ---------- 472
Cohoon v. Simmons ---------- 29 N. C., 189 ---------- 356
Collins, S. v. ---------- 30 N. C., 407 ---------- 532
Commissioners, Jones v. ---------- 69 N. C., 412 ---------- 236
Commissioners, Steele v. ---------- 70 N. C., 137 ---------- 236
Commissioners v. Clarke ---------- 73 N. C., 255 ---------- 179
Cook, S. v. ---------- 61 N. C., 535 ---------- 431
Cotten, Williams v. ---------- 56 N. C., 395 ---------- 381
Cotten v. Ellis ---------- 52 N. C., 545 ---------- 173
Cowles, R. R. v. ---------- 69 N. C., 59 ---------- 179
Cowan, Crook v. ---------- 64 N. C., 743 ---------- 316
Covington v. Leak ---------- 65 N. C., 594 ---------- 218
Cox v. Long ---------- 69 N. C., 7 ---------- 327
Craton, S. v. ---------- 28 N. C., 164 ---------- 532
Crittenden, Jones v. ---------- 4 N. C., 55 ---------- 261
Crook v. Cowan ---------- 64 N. C., 743 ---------- 316
Cross, Johnson v. ---------- 66 N. C., 167 ---------- 240
Crutchfield v. R. R. ---------- 76 N. C., 320 ---------- 438

D

Davis, Watson v. ---------- 52 N. C., 178 ---------- 49
Davis, S. v. ---------- 77 N. C., 483 ---------- 554
Davis, S. v. ---------- 15 N. C., 612 ---------- 569
Davis, Stowe v. ---------- 32 N. C., 431 ---------- 401
Darr, S. v. ---------- 63 N. C., 516 ---------- 540
Dean, S. v. ---------- 48 N. C., 393 ---------- 458
Deaton, S. v. ---------- 65 N. C., 496 ---------- 420

Deans, Hinton v. ---- 75 N. C., 18 ---- 7
Dick, S. v. ---- 60 N. C., 516 ---- 490
Dickey, Clancy v. ---- 9 N. C., 497 ---- 213
Dixon, S. v. ---- 75 N. C., 275 ---- 438
Dixon v. R. R. ---- 74 N. C., 538 ---- 299
Dodson v. Green ---- 15 N. C., 488 ---- 401
Duncan, S. v. ---- 28 N. C., 236 ---- 555
Duncan, S. v. ---- 28 N. C., 98 ---- 500
Dunlop, S. v. ---- 65 N. C., 288 ---- 537
Dudley v. Winfield ---- 45 N. C., 91 ---- 227
Dunn v. Barnes ---- 73 N. C., 273 ---- 36, 338

E

Earnhardt, Reed v. ---- 32 N. C., 516 ---- 359
Eaton v. Kelly ---- 72 N. C., 110 ---- 180
Edwards v. Tipton ---- 77 N. C., 222 ---- 348
Edwards, Jones v. ---- 53 N. C., 336 ---- 260
Ehringhaus v. Cartwright ---- 30 N. C., 39 ---- 416
Ellis, Bradshaw v. ---- 22 N. C., 20 ---- 401
Ellis, Cotten v. ---- 52 N. C., 545 ---- 173
Eskridge, S. v. ---- 27 N. C., 411 ---- 217
Evans v. Raper ---- 74 N. C., 639 ---- 93
Evans, McRae v. ---- 18 N. C., 243 ---- 217
Everton v. Everton ---- 50 N. C., 202 ---- 106

F

Fairbairn v. Fisher ---- 57 N. C., 390 ---- 42
Faison v. Bowden ---- 76 N. C., 425 ---- 126
Falls v. Sherrill ---- 19 N. C., 371 ---- 340
Ferebee v. Insurance Co. ---- 68 N. C., 11 ---- 155
Fisher, Fairbairn v. ---- 57 N. C., 390 ---- 42
Fisher, S. v. ---- 25 N. C., 111 ---- 453
Fitzrandolph v. Norman ---- 4 N. C., 564 ---- 359
Flintham v. Holder ---- 16 N. C., 345 ---- 414
Floyd, S. v. ---- 35 N. C., 382 ---- 441
Fogleman, Coble v. ---- 23 N. C., 440 ---- 472
Foster v. Penny ---- 77 N. C., 160 ---- 6
Foust v. Trice ---- 53 N. C., 490 ---- 363
Fox v. Alexander ---- 36 N. C., 340 ---- 220
Foye v. Bell ---- 18 N. C., 475 ---- 215
Foy, Gillespie v. ---- 40 N. C., 280 ---- 227
Fraley v. Kelly ---- 67 N. C., 78 ---- 341
Franks, Giles v. ---- 17 N. C., 521 ---- 395
Fugua, Richmond v. ---- 33 N. C., 445 ---- 125

G

Gallimore, S. v. ---- 29 N. C., 147 ---- 562
Galloway v. Jenkins ---- 63 N. C., 147 ---- 111
Galloway, Aston v. ---- 38 N. C., 126 ---- 389
Gales, Bunting v. ---- 77 N. C., 283 ---- 173
Garner v. Quarles ---- 49 N. C., 223 ---- 330
Gates, Love v. ---- 20 N. C., 363 ---- 362
Gantley, Long v. ---- 20 N. C., 315 ---- 562
Giles v. Franks ---- 17 N. C., 521 ---- 395

Gillespie v. Foy ---- 40 N. C., 280 ---- 227
Gilreath, Thompson v. ---- 48 N. C., 493 ---- 125
Godwin, Holmes v. ---- 69 N. C., 467 ---- 29
Godwin, S. v. ---- 27 N. C., 401 ---- 562
Gooch, Taylor v. ---- 48 N. C., 467 ---- 360
Goodman v. Smith ---- 15 N. C., 451 ---- 562
Gordon v. Price ---- 32 N. C., 385 ---- 93
Gorrell, Winborn v. ---- 38 N. C., 117 ---- 213
Governor v. Matlock ---- 8 N. C., 425 ---- 217
Graham, S. v. ---- 74 N. C., 646 ---- 501
Grant v. Winborne ---- 3 N. C., 56 ---- 357
Green v. Castleberry ---- 77 N. C., 164 ---- 268
Green, Dodson v. ---- 15 N. C., 488 ---- 401
Green v. R. R. ---- 73 N. C., 524 ---- 143
Gregory, S. v. ---- 50 N. C., 315 ---- 476
Grier v. Rhyne ---- 69 N. C., 346 ---- 400
Groom, Broadnax v. ---- 64 N. C., 244 ---- 111
Guyther v. Taylor ---- 38 N. C., 323 ---- 395

H

Hall v. Hall ---- 76 N. C., 113 ---- 11
Hall, S. v. ---- 73 N. C., 134 ---- 501
Hamilton v. Shepherd ---- 7 N. C., 115 ---- 130
Hampton, Carrier v. ---- 33 N. C., 307 ---- 350
Haney, S. v. ---- 19 N. C., 390 ---- 487
Hardin v. Cheek ---- 48 N. C., 135 ---- 348
Hardin, Cable v. ---- 67 N. C., 472 ---- 95
Harrell, March v. ---- 46 N. C., 329 ---- 570
Harris, Paschal v. ---- 74 N. C., 335 ---- 198
Harris, S. v. ---- 46 N. C., 190 ---- 569
Harrison v. Styres ---- 74 N. C., 290 ---- 261
Harrison v. Ward ---- 14 N. C., 417 ---- 213
Harvey v. Harvey ---- 72 N. C., 570 ---- 400
Harvey, Harvey v. ---- 72 N. C., 570 ---- 400
Hawkins, Cheatham v. ---- 76 N. C., 335 ---- 263
Havens v. Lathene ---- 75 N. C., 505 ---- 179
Hellen, Whitehead v. ---- 76 N. C., 99 ---- 198
Henderson, Hoke v. ---- 15 N. C., 1 ---- 173, 261
Heyer v. Beatty ---- 76 N. C., 28 ---- 8
Hill, S. v. ---- 72 N. C., 345 ---- 501
Hildreth, S. v. ---- 31 N. C., 429 ---- 532
Hinson, Sossamer v. ---- 72 N. C., 578 ---- 83
Hinson, Huggins v. ---- 61 N. C., 126 ---- 111
Hinton, Rogers v. ---- 63 N. C., 78 ---- 376
Hinton v. Deans ---- 75 N. C., 18 ---- 7
Hodge v. Hodge ---- 72 N. C., 616 ---- 382
Hoke v. Henderson ---- 15 N. C., 1 ---- 173, 261
Holder, Flintham v. ---- 16 N. C., 345 ---- 414
Holmes v. Godwin ---- 69 N. C., 467 ---- 29
Holt v. McLean ---- 75 N. C., 347 ---- 180
Hooper v. Moore ---- 48 N. C., 428 ---- 486
Horah v. Horah ---- 60 N. C., 650 ---- 375
Hornthall v. McRae ---- 67 N. C., 21 ---- 341
Horton v. Horton ---- 39 N. C., 54 ---- 220
House, S. v. ---- 65 N. C., 315 ---- 482

Huggins v. Hinson ---------- 61 N. C., 126 ---------- 111
Humphreys v. Buie ---------- 12 N. C., 378 ---------- 81
Hurdle, Outlaw v. ---------- 45 N. C., 150 ---------- 49
Hutchison v. Simons ---------- 67 N. C., 156 ---------- 19
Hyatt, Simpson v. ---------- 46 N. C., 517 ---------- 359

I

Ingram v. Ingram ---------- 49 N. C., 188 ---------- 331
Insurance Co., Ferebee v. ---------- 68 N. C., 11 ---------- 155

J

Jacobs v. Burgwyn ---------- 63 N. C., 196 ---------- 347
Jasper, S. v. ---------- 15 N. C., 323 ---------- 453
Jefferson, S. v. ---------- 28 N. C., 305 ---------- 476
Jenkins, Prairie v. ---------- 75 N. C., 545 ---------- 170
Jenkins, Galloway v. ---------- 63 N. C., 147 ---------- 111
Jernigan, Scull v. ---------- 22 N. C., 144 ---------- 225
John, S. v. ---------- 30 N. C., 330 ---------- 519
Johnson, S. v. ---------- 60 N. C., 151 ---------- 473
Johnson, S. v. ---------- 23 N. C., 354 ---------- 490
Johnson v. Cross ---------- 66 N. C., 167 ---------- 240
Johnson v. Winslow ---------- 63 N. C., 552 ---------- 80
Jones, S. v. ---------- 20 N. C., 122 ---------- 473
Jones, S. v. ---------- 67 N. C., 285 ---------- 569
Jones v. Brown ---------- 67 N. C., 475 ---------- 216
Jones v. Carter ---------- 73 N. C., 148 ---------- 364
Jones v. Commissioners ---------- 69 N. C., 412 ---------- 236
Jones v. Crittenden ---------- 4 N. C., 55 ---------- 261
Jones v. Edwards ---------- 53 N. C., 336 ---------- 260
Jones v. Powell ---------- 36 N. C., 337 ---------- 219
Jones v. Simmons ---------- 42 N. C., 178 ---------- 380

K

Kelly, Fraley v. ---------- 67 N. C., 78 ---------- 341
Kelly, Eaton v. ---------- 72 N. C., 110 ---------- 180
Kent, S. v. ---------- 65 N. C., 311 ---------- 473
Kesler v. Roseman ---------- 44 N. C., 389 ---------- 99
Kilburn, Mitchell v. ---------- 74 N. C., 483 ---------- 6, 416
King v. Weeks ---------- 70 N. C., 372 ---------- 260
King v. Winants ---------- 71 N. C., 469, and 73 N. C., 563 ---- 333

L

Lamb, Bray v. ---------- 17 N. C., 372 ---------- 389
Latta v. Russ ---------- 53 N. C., 111 ---------- 224
Latham, Bateman v. ---------- 56 N. C., 35 ---------- 227
Lathene, Havens v. ---------- 75 N. C., 505 ---------- 179
Lawrence, McRae v. ---------- 75 N. C., 289 ---------- 406
Leak, Covington v. ---------- 65 N. C., 594 ---------- 218
Leeper, Smith v. ---------- 32 N. C., 86 ---------- 125
Lewis, Poole v. ---------- 75 N. C., 417 ---------- 75
Linkhaw, S. v. ---------- 69 N. C., 214 ---------- 454
Lippard v. Roseman ---------- 72 N. C., 427 ---------- 337
Lookabill, Stith v. ---------- 71 N. C., 25 ---------- 5
Lockman, Office v. ---------- 12 N. C., 146 ---------- 176

Long, Cox v. ---- 69 N. C., 7 ---- 327
Loftin v. Cobb ---- 46 N. C., 406 ---- 357
Logan v. Wallis ---- 76 N. C., 416 ---- 23
Long v. Gantley ---- 20 N. C., 315 ---- 562
Low, Smith v. ---- 24 N. C., 457 ---- 33
Love v. Gates ---- 20 N. C., 363 ---- 362
Love v. Moody ---- 68 N. C., 200 ---- 562
Lovingood, Blythe v. ---- 24 N. C., 20 ---- 331
Lupton, S. v. ---- 63 N. C., 483 ---- 540
Lytle, S. v. ---- 27 N. C., 58 ---- 473

M

Mable, Rogers v. ---- 15 N. C., 180 ---- 359
Malone, Shehan v. ---- 72 N. C., 59 ---- 29
Manuel, S. v. ---- 20 N. C., 20 ---- 431, 541
March v. Berrier ---- 41 N. C., 524 ---- 226
March v. Harrell ---- 46 N. C., 329 ---- 570
Mason, Stanly v. ---- 69 N. C., 1 ---- 236
Matlock, Governor v. ---- 8 N. C., 425 ---- 217
Mauney v. Pemberton ---- 75 N. C., 219 ---- 55
Maultsby, Wooten v. ---- 69 N. C., 462 ---- 82
Maxwell, Wallace v. ---- 32 N. C., 110 ---- 359
Maxwell v. Wallace ---- 45 N. C., 251 ---- 266
May, S. v. ---- 15 N. C., 328 ---- 555
McCormick v. Monroe ---- 46 N. C., 13 ---- 356
McKeithan v. Walker ---- 66 N. C., 95 ---- 95
McLean, Holt v. ---- 75 N. C., 347 ---- 180
McLeod, S. v. ---- 8 N. C., 344 ---- 563
McRae v. Evans ---- 18 N. C., 243 ---- 217
McRae v. Lawrence ---- 75 N. C., 289 ---- 406
McRae, Pemberton v. ---- 75 N. C., 497 ---- 400
McRae, Hornthall v. ---- 67 N. C., 21 ---- 341
Melchor, Miller v. ---- 35 N. C., 439 ---- 363
Mendenhall v. Mendenhall ---- 53 N. C., 287 ---- 410
Merritt v. Merritt ---- 2 N. C., 20 ---- 176
Miller, S. v. ---- 75 N. C., 73 ---- 425
Miller v. Melchor ---- 35 N. C., 439 ---- 363
Mills, Carson v. ---- 69 N. C., 32 ---- 288
Minor, Rankin v. ---- 72 N. C., 424 ---- 20
Mitchell v. Kilburn ---- 74 N. C., 483 ---- 6, 416
Monroe, McCormick v. ---- 46 N. C., 13 ---- 356
Moody, Love v. ---- 68 N. C., 200 ---- 562
Moore, Hooper v. ---- 48 N. C., 428 ---- 486
Moore, Reed v. ---- 25 N. C., 313 ---- 562
Moses, S. v. ---- 13 N. C., 452 ---- 487
Morehead v. Wriston ---- 73 N. C., 398 ---- 126
Mulford, Andrews v. ---- 2 N. C., 311 ---- 357

N

New Bern, Wade v. ---- 72 N. C., 498 ---- 9
Nixon, Bledsoe v. ---- 69 N. C., 81 ---- 28
Norman, Fitzrandolph v. ---- 4 N. C., 564 ---- 359
Nutt, S. v. ---- 61 N. C., 20 ---- 572

O

Oates, Carson v. ---- 64 N. C., 115 ---- 17
Office v. Lockman ---- 12 N. C., 146 ---- 176
Officers v. Taylor ---- 12 N. C., 99 ---- 176
O'Neal, S. v. ---- 29 N. C., 251 ---- 561
Outlaw v. Hurdle ---- 45 N. C., 150 ---- 49
Owen v. Barksdale ---- 30 N. C., 81 ---- 348

P

Parker, S. v. ---- 75 N. C., 249 ---- 458
Parker v. Shuford ---- 76 N. C., 219 ---- 126
Paschal v. Harris ---- 74 N. C., 335 ---- 198
Patrick, Blakely v. ---- 67 N. C., 40 ---- 400
Patton, S. v. ---- 27 N. C., 180 ---- 440
Pemberton, Mauney v. ---- 75 N. C., 219 ---- 55
Pemberton v. McRae ---- 75 N. C., 497 ---- 400
Penny v. Smith ---- 61 N. C., 35 ---- 337
Penny, Foster v. ---- 77 N. C., 160 ---- 6
Perry v. Tupper ---- 70 N. C., 538 ---- 87
Perry, Boykin v. ---- 49 N. C., 325 ---- 487
Phelps, Brandon v. ---- 77 N. C., 44 ---- 338
Phifer, S. v. ---- 65 N. C., 321 ---- 462
Platt v. R. R. ---- 65 N. C., 74 ---- 80
Poole v. Lewis ---- 75 N. C., 417 ---- 75
Pool, Proctor v. ---- 15 N. C., 370 ---- 400
Potts, Rhinehart v. ---- 29 N. C., 403 ---- 562
Powe, Tate v. ---- 64 N. C., 644 ---- 14
Powell, Jones v. ---- 36 N. C., 337 ---- 219
Powell v. R. R. ---- 68 N. C., 395 ---- 490
Prairie v. Jenkins ---- 75 N. C., 545 ---- 170
Price, Gordon v. ---- 32 N. C., 385 ---- 93
Proctor v. Pool ---- 15 N. C., 370 ---- 400

Q

Quarles, Garner v. ---- 49 N. C., 223 ---- 330

R

R. R. v. Cowles ---- 69 N. C., 59 ---- 179
R. R. v. Sharpe ---- 70 N. C., 509 ---- 87
R. R. v. Wicker ---- 74 N. C., 220 ---- 51
R. R., Crutchfield v. ---- 76 N. C., 320 ---- 438
R. R., Dixon v. ---- 74 N. C., 538 ---- 299
R. R., Green v. ---- 73 N. C., 524 ---- 143

R. R., Powell v. ---- 68 N. C., 395 ---- 490
R. R., Platt v. ---- 65 N. C., 74 ---- 80
Raper, Evans v. ---- 74 N. C., 639 ---- 93
Rankin v. Minor ---- 72 N. C., 424 ---- 20
Reed v. Earnhardt ---- 32 N. C., 516 ---- 359
Reed v. Moore ---- 25 N. C., 313 ---- 562
Reeves, Adams v. ---- 76 N. C., 412 ---- 79
Rhinehart v. Potts ---- 29 N. C., 403 ---- 562
Rhyne, Grier v. ---- 69 N. C., 346 ---- 400
Richmond v. Fugua ---- 33 N. C., 445 ---- 125
Rogers v. Hinton ---- 63 N. C., 78 ---- 376

Rogers, Smith v. ---- 65 N. C., 181 ---- 80
Rogers v. Mable ---- 15 N. C., 180 ---- 359
Roseman, S. v. ---- 66 N. C., 634 ---- 507
Roseman, Lippard v. ---- 72 N. C., 427 ---- 337
Roseman, Kesler v. ---- 44 N. C., 389 ---- 99
Russ, Latta v. ---- 53 N. C., 111 ---- 224

S

Samuel, S. v. ---- 48 N. C., 74 ---- 519
Satterfield, S. v. ---- 31 N. C., 358 ---- 224
Sawyer, Wood v. ---- 61 N. C., 251 ---- 403
Sawyer v. Sawyer ---- 28 N. C., 407 ---- 416
Scates, S. v. ---- 50 N. C., 420 ---- 476
Scott, S. v. ---- 19 N. C., 35 ---- 487
Scull v. Jernigan ---- 22 N. C., 144 ---- 225
Sharpe, R. R. v. ---- 70 N. C., 509 ---- 87
Shaw, S. v. ---- 25 N. C., 20 ---- 420, 473
Shehan v. Malone ---- 72 N. C., 59 ---- 29
Shuford, Parker v. ---- 76 N. C., 219 ---- 126
Shepherd, Hamilton v. ---- 7 N. C., 115 ---- 130
Sherrill, Falls v. ---- 19 N. C., 371 ---- 340
Simmons, Bartlett v. ---- 49 N. C., 295 ---- 357
Simmons, Jones v. ---- 42 N. C., 178 ---- 380
Simmons, Cohoon v. ---- 29 N. C., 189 ---- 356
Simons, Hutchison v. ---- 67 N. C., 156 ---- 19
Simpson v. Blount ---- 14 N. C., 34 ---- 487
Simpson v. Hyatt ---- 46 N. C., 517 ---- 359
Sizemore, S. v. ---- 52 N. C., 206 ---- 532
Skinner, S. v. ---- 25 N. C., 564 ---- 217
Smith v. Barham ---- 17 N. C., 420 ---- 379
Smith v. Leeper ---- 32 N. C., 86 ---- 125
Smith v. Low ---- 24 N. C., 457 ---- 33
Smith v. Rogers ---- 65 N. C., 181 ---- 80
Smith, Camp v. ---- 68 N. C., 537 ---- 383
Smith, Penny v. ---- 61 N. C., 35 ---- 337
Smith, Goodman v. ---- 15 N. C., 451 ---- 562
Sossamer v. Hinson ---- 72 N. C., 578 ---- 83
Stanly v. Mason ---- 69 N. C., 1 ---- 236
S. v. Allen ---- 24 N. C., 183 ---- 84
S. v. Alman ---- 64 N. C., 364 ---- 550
S. v. Angel ---- 29 N. C., 27 ---- 438
S. v. Bennett ---- 75 N. C., 305 ---- 442
S. v. Bishop ---- 73 N. C., 45 ---- 554
S. v. Brandon ---- 53 N. C., 463 ---- 406
S. v. Brown ---- 76 N. C., 222 ---- 436
S. v. Burrows ---- 33 N. C., 477 ---- 461
S. v. Collins ---- 30 N. C., 407 ---- 532
S. v. Cook ---- 61 N. C., 535 ---- 431
S. v. Craton ---- 28 N. C., 164 ---- 532
S. v. Darr ---- 63 N. C., 516 ---- 540
S. v. Davis ---- 77 N. C., 483 ---- 554
S. v. Davis ---- 15 N. C., 612 ---- 569
S. v. Dean ---- 48 N. C., 393 ---- 458
S. v. Deaton ---- 65 N. C., 496 ---- 420
S. v. Dick ---- 60 N. C., 516 ---- 490

S. v. Dixon ---- 75 N. C., 275 ---- 438
S. v. Duncan ---- 28 N. C., 98 ---- 500
S. v. Duncan ---- 28 N. C., 236 ---- 555
S. v. Dunlop ---- 65 N. C., 288 ---- 537
S. v. Eskridge ---- 27 N. C., 411 ---- 217
S. v. Fisher ---- 25 N. C., 111 ---- 453
S. v. Floyd ---- 35 N. C., 382 ---- 441
S. v. Gallimore ---- 29 N. C., 147 ---- 562
S. v. Godwin ---- 27 N. C., 401 ---- 562
S. v. Graham ---- 74 N. C., 646 ---- 501
S. v. Gregory ---- 50 N. C., 315 ---- 476
S. v. Hall ---- 73 N. C., 134 ---- 501
S. v. Haney ---- 19 N. C., 390 ---- 487
S. v. Harris ---- 46 N. C., 190 ---- 569
S. v. Hildreth ---- 31 N. C., 429 ---- 532
S. v. Hill ---- 72 N. C., 345 ---- 501
S. v. House ---- 65 N. C., 315 ---- 482
S. v. Jasper ---- 15 N. C., 323 ---- 453
S. v. Jefferson ---- 28 N. C., 305 ---- 476
S. v. John ---- 30 N. C., 330 ---- 519
S. v. Johnson ---- 60 N. C., 151 ---- 473
S. v. Johnson ---- 23 N. C., 354 ---- 490
S. v. Jones ---- 20 N. C., 122 ---- 473
S. v. Jones ---- 67 N. C., 285 ---- 569
S. v. Kent ---- 65 N. C., 311 ---- 473
S. v. Linkhaw ---- 69 N. C., 214 ---- 454
S. v. Lupton ---- 63 N. C., 483 ---- 540
S. v. Lytle ---- 27 N. C., 58 ---- 473
S. v. Manuel ---- 20 N. C., 20 ---- 431, 541
S. v. May ---- 15 N. C., 328 ---- 555
S. v. McLeod ---- 8 N. C., 344 ---- 563
S. v. Miller ---- 75 N. C., 73 ---- 425
S. v. Moses ---- 13 N. C., 452 ---- 487
S. v. Nutt ---- 61 N. C., 20 ---- 572
S. v. O'Neal ---- 29 N. C., 251 ---- 561
S. v. Parker ---- 75 N. C., 249 ---- 458
S. v. Patton ---- 27 N. C., 180 ---- 440
S. v. Phifer ---- 65 N. C., 321 ---- 462
S. v. Roseman ---- 66 N. C., 634 ---- 507
S. v. Samuel ---- 48 N. C., 74 ---- 519
S. v. Satterfield ---- 31 N. C., 358 ---- 224
S. v. Scates ---- 50 N. C., 420 ---- 476
S. v. Scott ---- 19 N. C., 35 ---- 487
S. v. Shaw ---- 25 N. C., 20 ---- 420, 473
S. v. Sizemore ---- 52 N. C., 206 ---- 532
S. v. Skinner ---- 25 N. C., 564 ---- 217
S. v. Swink ---- 20 N. C., 358 ---- 453
S. v. Taylor ---- 8 N. C., 362 ---- 550
S. v. Turpin ---- 77 N. C., 473 ---- 530
S. v. Walker ---- 4 N. C., 662 ---- 532
S. v. Whit ---- 50 N. C., 225 ---- 561
S. v. White ---- 68 N. C., 158 ---- 555
S. v. Williams ---- 47 N. C., 194 ---- 472, 569
S. v. Wilson ---- 32 N. C., 131 ---- 440
S. v. Wise ---- 66 N. C., 120, and 67 N. C., 281 ---- 573

S. v. Woodruff ---- 67 N. C., 89 ---- 442
S. v. Yarborough ---- 70 N. C., 250 ---- 87
Steele v. Commissioners ---- 70 N. C., 137 ---- 236
Stephenson, Vaughn v. ---- 69 N. C., 212 ---- 36
Stith v. Lookabill ---- 71 N. C., 25 ---- 5
Stout v. Woody ---- 63 N. C., 37 ---- 161
Stowe v. Davis ---- 32 N. C., 431 ---- 401
Styres, Harrison v. ---- 74 N. C., 290 ---- 261
Swink, S. v. ---- 20 N. C., 358 ---- 453
Sutton v. West ---- 77 N. C., 429 ---- 395

T

Tate v. Powe ---- 64 N. C., 644 ---- 14
Tayloe v. Bond ---- 45 N. C., 5 ---- 380
Taylor v. Gooch ---- 48 N. C., 467 ---- 360
Taylor, S. v. ---- 8 N. C., 362 ---- 550
Taylor, Guyther v. ---- 38 N. C., 323 ---- 395
Taylor, Officers v. ---- 12 N. C., 99 ---- 176
Thompson v. Gilreath ---- 48 N. C., 493 ---- 125
Thompson v. Whitman ---- 49 N. C., 47 ---- 331
Thompson, Vanover v. ---- 49 N. C., 485 ---- 330
Tipton, Edwards v. ---- 77 N. C., 222 ---- 348
Trice, Foust v. ---- 53 N. C., 490 ---- 363
Trustees, Tull v. ---- 75 N. C., 424 ---- 75
Tull v. Trustees ---- 75 N. C., 424 ---- 75
Tupper, Perry v. ---- 70 N. C., 538 ---- 87
Turpin, S. v. ---- 77 N. C., 473 ---- 530

V

Vanover v. Thompson ---- 49 N. C., 485 ---- 330
Vaughn v. Stephenson ---- 69 N. C., 212 ---- 36

W

Wade v. New Bern ---- 72 N. C., 498 ---- 9
Wagner, Clarke v. ---- 74 N. C., 791 ---- 368
Wallace v. Maxwell ---- 32 N. C., 110 ---- 359
Wallace, Maxwell v. ---- 45 N. C., 251 ---- 266
Wallis, Logan v. ---- 76 N. C., 416 ---- 23
Walker, S. v. ---- 4 N. C., 662 ---- 532
Walker, McKeithan v. ---- 66 N. C., 95 ---- 95
Ward, Harrison v. ---- 14 N. C., 417 ---- 213
Warlick v. White ---- 76 N. C., 175 ---- 442
Watson v. Davis ---- 52 N. C., 178 ---- 49
Weeks, King v. ---- 70 N. C., 372 ---- 260
West, Sutton v. ---- 77 N. C., 429 ---- 395
Whit, S. v. ---- 50 N. C., 225 ---- 561
White, S. v. ---- 68 N. C., 158 ---- 555
White, Warlick v. ---- 76 N. C., 175 ---- 442
Whitehead v. Hellen ---- 76 N. C., 99 ---- 198
Whitman, Thompson v. ---- 49 N. C., 47 ---- 331
Wicker, R. R. v. ---- 74 N. C., 220 ---- 51
Williams v. Cotten ---- 56 N. C., 395 ---- 381
Williams, Baines v. ---- 25 N. C., 481 ---- 131
Williams, S. v. ---- 47 N. C., 194 ---- 472, 569

Williams, Bank v. ---------- 24 N. C., 147 ---------- 33
Wilkes, Burton v. ---------- 66 N. C., 604 ---------- 49
Wilson, S. v. ---------- 32 N. C., 131 ---------- 440
Winants, King v. ---------- 71 N. C., 469, and 73 N. C., 563 ---- 333
Winborn v. Gorrell ---------- 38 N. C., 117 ---------- 213
Winborne, Grant v. ---------- 3 N. C., 56 ---------- 357
Winfield, Dudley v. ---------- 45 N. C., 91 ---------- 227
Winslow, Johnson v. ---------- 63 N. C., 552 ---------- 80
Winstead, Batts v. ---------- 77 N. C., 238 ---------- 132
Wise, S. v. ---------- 66 N. C., 120, and 67 N. C., 281 ---- 573
Wood v. Sawyer ---------- 61 N. C., 251 ---------- 403
Woodruff, S. v. ---------- 67 N. C., 89 ---------- 442
Woody, Stout v. ---------- 63 N. C., 37 ---------- 161
Woods v. Woods ---------- 55 N. C., 20 ---------- 401
Wooten v. Maultsby ---------- 69 N. C., 462 ---------- 82
Wriston, Morehead v. ---------- 73 N. C., 398 ---------- 126

Y

Yarborough, S. v. ---------- 70 N. C., 250 ---------- 87

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

JANUARY TERM, 1878

ALICE B. OWENS AND OTHERS v. W. M. ALEXANDER AND OTHERS.

Practice—Decree—Inoperative as to One Not a Party.

One not a party to an action is not bound by any decree rendered therein; and this is so although such person was originally a party plaintiff.

APPEAL from *Cloud, J.*, at Spring Term, 1877, of MECKLENBURG.

This action was commenced 30 October, 1871, and Stephen C. Johnston, one of the defendants, was originally a plaintiff, but was allowed on motion to withdraw from the cause soon after it was instituted.

It appeared that the plaintiffs agreed to sell a certain tract of land known as the "gold mine tract" to said Johnston for $5,000, to be paid when he could get a good title, and the purpose of the original suit was to perfect that title, judgment being demanded that a decree be made requiring the defendants to convey their interests by deed in fee to the plaintiff Alice B. Owens, or to the said Johnston upon his (2) paying said sum of $5,000. At Fall Term, 1873, the defendants answered the allegations in the complaint, and the case was continued from term to term, until August Special Term, 1875, when it was submitted to a jury to find certain issues, and at Spring Term, 1876, a final decree was made by *Schenck, J.*, in which it was adjudged . . . "that thereupon this action was brought to set up said deed as a lost deed, and pending said action the said agreement between the plaintiffs and said Johnston has been so modified that title is to be made to him upon his paying the sum of $3,475; and the court doth declare that by virtue of the verdict herein rendered, and also the foregoing facts touching the transfer and devolution of said premises, the plaintiffs can make a good title thereto to said Johnston in fee." And it was

further decreed that plaintiffs do execute a deed in fee to be delivered to said Johnston upon payment of said sum, which said sum it was decreed said Johnston should pay into the clerk's office, and upon which the clerk was directed to deliver the deed.

A copy of this decree was delivered to said Johnston on 13 March, 1877, and his Honor, upon motion of the plaintiffs, ordered the case to be reinstated on the docket, and a notice to be served on Johnston to show cause why he should not perform said decree. The plaintiffs were also granted an order for the appointment of a receiver of the property which was in the possession of said Johnston, who excepted: (1) Because said order was made in a cause to which he was not a party, and which had been determined by verdict and judgment, and (2) Because said order was made without notice to him, or any attorney in fact or agent of his.

(3) *Wilson & Son for plaintiffs.*
W. H. Bailey for defendant.

READE, J. The defendant Johnston was originally one of the plaintiffs in the cause, but at an early stage of it he was permitted to retreat. Subsequently a decree was made that upon his paying so much money a title to the land should be made to him, of which land he is in possession. And now a notice is served on him to show cause why he should not perform the decree, and why in the meantime a receiver should not be appointed to take possession of the land and the mines thereon. To this the defendant answers that he was not a party in the cause at the time the decree was made, and that therefore the same is a nullity as to him.

Unquestionably this is a complete defense. A record imports absolute verity as to parties and privies, but third persons are not bound thereby. It was indeed insisted at the bar that it appears that it was a consent decree. Admit it; but that means the consent of those who were parties, and not of those who were not parties. It was further said that it was drawn by Johnston's counsel. That does not appear; on the contrary, the record, by which we are bound, shows that Johnston was not a party, and had no counsel. It may be that the plaintiffs may suffer by the carelessness of the record, but while it may be regretted, we cannot control it. The record controls us.

PER CURIAM. Reversed.

Cited: Dickens v. Long, 109 N. C., 172; *Leroy v. Steamboat Co.,* 165 N. C., 114.

(4)

STATE ON RELATION OF NANCY CRAWLEY v. N. W. WOODFIN, ADMINISTRATOR, AND OTHERS.

Practice—Appeal.

No appeal lies to this Court from the refusal of the court below to dismiss an action or to nonsuit the plaintiff.

SMITH, C. J., and BYNUM, J., did not sit on the hearing of this case.

APPEAL from *Schenck, J.*, at November Special Term, 1877, of BURKE.

The facts are sufficiently stated by *Mr. Justice Rodman* in delivering the opinion of this Court.

The defendant, who had previously demurred, withdrew his demurrer, and the defendant's counsel then moved upon the complaint and the original answer to dismiss the case. His Honor declined to grant the motion, and the defendant appealed.

Merrimon, Fuller & Ashe for plaintiff.
G. N. Folk, R. F. Armfield, and D. G. Fowle for defendant.

RODMAN, J. This action was commenced on 3 October, 1874. The original defendants were N. W. Woodfin, administrator of McDowell, R. M. Pearson, N. W. Woodfin, administrator of John W. Woodfin, and W. F. McKesson. Pearson having died, his executor was made a party in this Court.

The complaint alleges, in substance, that at Spring Term, 1869, of Burke Superior Court the relator recovered a judgment against N. W. Woodfin, administrator of McDowell, and that a part of it is still unpaid; that McDowell died in 1859; N. W. Woodfin was appointed his administrator, and gave bond in the usual form (5) with Pearson, McKesson, and John W. Woodfin as his sureties. The relator assigns as a breach, that N. W. Woodfin, the administrator, received a large amount of personal property, more than sufficient to have paid all the debts of McDowell and the costs of administration, and that he failed to pay the debt to the relator, but delivered the property to the legatees without taking refunding bonds, to the damage of the relator, etc.

At Spring Term, 1875, N. W. Woodfin and Pearson filed separate answers. The plaintiff replied. At Fall Term, 1875, the death of N. W. Woodfin was suggested, and it was ordered that notice issue to his administrator. At Spring Term, 1876, the administrator of N. W. Woodfin, and the administrator *de bonis non* of McDowell, were made parties. The plaintiff then by leave of the court amended the complaint

by assigning as a further breach the nonpayment of the note upon which the aforesaid judgment was recovered. The note was dated 28 December, 1858, and payable one day after date.

At Fall Term, 1876, Pearson, not abandoning his answer, demurred to the amended complaint and alleged as ground that John Gray Bynum, the administrator *de bonis non* of McDowell, was the only proper relator in an action on the administration bond of Woodfin, and the relator Crawley cannot maintain the action. At a special term in November, 1877, the defendant Pearson withdrew his demurrer, and moved to dismiss the action, which motion was refused, and the defendants appealed to this Court.

It has been several times held in this Court that no appeal will lie from the refusal of a motion to dismiss an action, or to nonsuit
(6) a plaintiff. *Stith v. Lookabill,* 71 N. C., 25; *Foster v. Penry,* 77 N. C., 160; *Mitchell v. Kilburn,* 74 N. C., 483.

In those cases, as in this, the counsel argued the cases upon their merits as appearing on the complaints, which might be deemed a waiver of a right to dismiss the appeal on the ground that no appeal would lie from such a refusal. But the consent of the counsel cannot give this Court jurisdiction of an appeal where it has none, or prevent the inconveniences of such a practice. It is clear that it is not one of the cases in which an appeal is allowed by C. C. P., sec. 299. The refusal affects no substantial right; the defenses of the defendant are all as open to him as they ever were. If appeals are allowed in such cases, litigation will be immensely protracted and the costs increased. By a motion to dismiss, or to nonsuit, the court is asked to give an opinion upon a state of facts which the defendant at the same time denies to be true. A demurrer which *pro hac vice* admits the facts alleged is the only mode known to the law in which a judgment of a court can be obtained upon the sufficiency in law of a complaint.

A Superior Court is not a mere moot court to give opinions which have no practical effect. Its duty is to decide real controversies, and to give such judgments therein as may be enforced, thus doing practical work and ending litigation, which is always an evil.

No case has been found, and probably none can be, either where the common-law practice or The Code prevails, in which an appeal is allowed in such a case; and for this uniformity of holding there must be some good reason. If this Court should, after laborious thought and research, express its opinion on the facts alleged in the complaint, it would be idle, for the facts are denied. It will be time enough for us to apply the law to the facts when the facts are found or admitted, so that we can give some effective judgment thereon.

PER CURIAM. Appeal dismissed.

Cited: Sutton v. Schonwald, 80 N. C., 23; *R. R. v. Richardson,* 82 N. C., 344; *Gay v. Brookshire, ib.,* 411; *Turlington v. Williams,* 84 N. C., 127; *Spaugh v. Boner,* 85 N. C., 210; *Merrill v. Merrill,* 92 N. C., 668; *Davis v. Ely,* 100 N. C., 286; *Scroggs v. Stevenson, ib.,* 358; *Plemmons v. Impr. Co.,* 108 N. C., 616; *Midgett v. Mfg. Co.,* 140 N. C., 364; *Merrick v. Bedford,* 141 N. C., 505.

(7)

R. H. LANE v. D. W. MORTON.

Practice—Action Under Landlord and Tenant Act—Appeal from Justice's Court—Answer of Defendant.

In an action under the landlord and tenant act, begun before a justice of the peace, and carried by appeal to the Superior Court, it was an error in the court to allow the defendant to file an answer claiming title in himself and raising the question of the jurisdiction of the justice's court, although a motion to file such answer had been denied by the justice.

APPEAL from *Eure, J.,* at Fall Term, 1877, of PAMLICO.

This action was commenced before a justice of the peace, under the landlord and tenant act, to recover possession of real estate. The defendant claimed title in himself to the premises, and at the hearing in July, 1877, asked leave to file his answer in writing, raising the question of jurisdiction. The justice refused the motion and gave judgment for the plaintiff. On appeal, the defendant asked leave to be allowed to file the same answer which he had offered before the justice. His Honor allowed the motion, and from that order the plaintiff appealed.

No counsel for plaintiff.
W. J. Clarke & Son for defendant.

FAIRCLOTH, J., after stating the facts as above: The only question is, Did the judge have the power to allow the answer to be filed? In *Hinton v. Deans,* 75 N. C., 18, the defendant applied to his Honor to be allowed to add the plea of the statute of limitations, and we decided that it was discretionary and not a matter of right in the defendant.

In *Heyer v. Beatty,* 76 N. C., 28, we held that the defendant ought to be allowed to amend his answer and make it what he intended it to be before the justice, and that decision governs the present (8) case, which involves the same question.

PER CURIAM. Affirmed.

Cited: Lane v. Morton, 81 N. C., 38.

SAMUEL H. TAYLOR v. JOHN M. BROWER.

Practice—Appeal to this Court.

On appeals to this Court, if the parties by express agreement appearing upon record extend the time allowed by law for preparing cases for this Court, such agreement will be respected; but if they disagree in regard to time or any material thing to be done, after the time allowed by law has expired, the rule of law governing appeals will be enforced.

SMITH, C. J., having been of counsel, did not sit on the hearing of this case.

MOTION for a *certiorari,* heard at January Term, 1878, of the SUPREME COURT.

The defendant filed his petition for a *certiorari* at June Term, 1877, of this Court, and upon the hearing at this term the motion was not allowed, and the petition dismissed.

Gray & Stamps for plaintiff.
Merrimon, Fuller & Ashe for defendant.

FAIRCLOTH, J. The rule for perfecting appeals under C. C. P. was laid down in plain terms in *Wade v. New Bern,* 72 N. C., 498, and has been since approved several times. If the parties by express
(9) agreement appearing on record extend the time allowed by law for preparing the case for this Court, their agreement will be respected; but if they disagree in regard to time or any material thing to be done after the time allowed by law has expired, the whole contention will be disregarded and the rule of law will be applied.

In the present case it was agreed, as we understand the affidavits, that the appellant would serve his statements at Yadkin Court. If this is not true, the appellant is without any ground to stand on, as no other time or place was designated, and the rule requiring it to be made, and copy furnished within five days from the entry of appeal, disposes of the question against him. It is admitted that no statement of the case was furnished the appellee at Yadkin Court, although an attorney of each party was present until the court adjourned on Thursday of the first week; also, that no copy was furnished within the two weeks assigned to said court, although opposing counsel resided in the same town and were there after the court had adjourned.

It is alleged that the appellant's counsel, who was relied upon to make out the statement of the case and serve it, went to Greensboro on professional business and expected to attend to the matter during the second week of Yadkin Court, but on hearing of the adjournment of court, did not go. Admitting all this to be true, it furnishes no sufficient excuse to

the appellant. The court did not adjourn by accident, but as usual, only a day or two sooner than at former terms. The case was not made up according to the agreement, nor according to law. The motion for a *certiorari* is not allowed.

PER CURIAM. Motion denied.

Cited: S. v. Price, 110 N. C., 602; *Glanton v. Jacobs,* 117 N. C., 428.

---

(10)

M. FRANK PAIGE v. H. PRICE & CO. AND OTHERS.

Practice—Arrest and Bail—Sufficiency of Affidavit.

In an action for arrest and bail, the affidavit of the plaintiff alleged the existence of a cause of action and the fraud committed by defendants in contracting the debt, and that upon information and belief they had fraudulently removed and disposed of their property. *Held,* sufficient to justify the order of arrest.

APPEAL from a judgment vacating an order of arrest, made at Spring Term, 1877, of CUMBERLAND, by *McKoy, J.*

The case is sufficiently stated by the *Chief Justice* in delivering the opinion of this Court.

R. S. Huske for plaintiff.
MacRae & Broadfoot and G. M. Rose for defendants.

SMITH, C. J. This is an appeal by the plaintiff from a judgment vacating an order of arrest previously made and discharging the bail bonds which had been given.

The order of arrest was based upon an affidavit of the plaintiff in these words:

M. FRANK PAIGE
against
HANNAH PRICE, ABRAHAM ELSON, PARTNERS AS H. PRICE & CO., WILLIAM PRICE AND SIMON BRANDT.

1. M. Frank Paige being duly sworn, says that he is the plaintiff above named; that a sufficient cause of action exists in his favor against William Price, Hannah Price, Abraham Elson and Simon Brandt, the grounds of which appear by the sworn complaint in this action hereto annexed, all the statements contained in which complaint are true to the best of his knowledge, information, and belief. (11)

2. That said defendants have been guilty of fraud in contracting the debt for which this action is brought, the particulars of which are set forth in the complaint of the plaintiff.

3. That the defendants have, as this affiant is informed and believes, removed and disposed of their property with the intent to defraud their creditors.

4. That the plaintiff has commenced an action in this court against all of the defendants upon the cause of action stated in the complaint.

M. FRANK PAIGE.

Subscribed and sworn to before me, 11 December, 1876, at the city of Boston, in the county of Suffolk and State of Massachusetts.

JAS. B. BELL,
Commissioner of Deeds for the State of North Carolina, Residing in Boston.

[SEAL.]

The plaintiff in his affidavit alleges a sufficient cause of action to exist—the fraud committed by defendants in contracting the debt—and that upon information and belief they have fraudulently removed and disposed of their property: thus separating the facts that are within his knowledge from those which are stated upon information and belief, and makes oath that the statement is true.

This, in our opinion, meets the requirements of the Code of Civil Procedure, sec. 151, and justifies the order of arrest.

Benedict v. Hall, 76 N. C., 113, relied on to sustain the ruling of the judge in the court below, simply decides that a notary public, acting in another State, was incompetent under our law to take and certify an affidavit to be used as evidence in the courts of this State. It is true, the opinion is expresssed that the form of verification adopted in
(12) that case was essentially defective, yet the point was not involved in the decision of the cause. But without calling in question the correctness of the opinion, our case is plainly distinguishable from that then before the Court, in that the statement, unconditionally supported by the plaintiff's oath, discriminates between those *facts averred upon knowledge* and *those resting upon information and belief.*

PER CURIAM. Reversed.

Approved: Peebles v. Foote, 83 N. C., 105; *Young v. Rollins,* 85 N. C., 490.

Distinguished: Cowles v. Hardin, 79 N. C., 580.

ELIZABETH H. RAND v. N. G. RAND AND OTHERS.

Practice—Supplemental Proceedings.

1. A judgment creditor whose execution has been returned unsatisfied cannot maintain an *action* against an administrator to subject a distributive share of the judgment debtor in the estate to the satisfaction of the debt. He must proceed by *supplemental proceedings.*
2. Proceedings supplemental to execution under C. C. P. are a substitute for the former creditor's bill, and are governed by the principles established under the former practice in administering this species of relief in behalf of judgment creditors.

(The practice in regard to supplemental proceedings discussed and explained by MR. JUSTICE BYNUM.)

APPEAL from *Buxton, J.,* at Spring Term, 1877, of WAKE.

The facts are embodied in the opinion of this Court delivered by *Mr. Justice Bynum.* There was judgment in the court below for the plaintiff, and the defendants appealed. (13)

D. G. Fowle and G. H. Snow for plaintiff.
W. H. Pace and Merrimon, Fuller & Ashe for defendants.

BYNUM, J. The plaintiff, Elizabeth H. Rand, in 1869, obtained judgment against the defendant N. G. Rand for the sum of $1,935.81 in the Superior Court of Wake County, and caused an execution to be issued thereupon, which was afterwards duly returned unsatisfied.

In 1876 one Parker Rand died intestate in the county of Wake, possessed of a personal estate, and the said N. G. Rand and D. G. Rand became his administrators. This action was begun by original summons against the defendant N. G. Rand individually and N. G. and D. G. Rand as administrators of Parker Rand.

The complaint alleges that N. G. Rand, the defendant in the execution, is entitled to a distributive share in the estate of Parker Rand, as next of kin, and prays that it may be ascertained by account taken, and so much thereof as may be necessary for that purpose be applied in satisfaction of the plaintiff's judgment, and in the meantime asks for a restraining order.

The defendants demurred to the complaint on the ground of want of jurisdiction in the court. The demurrer was overruled, and the defendants then put in an answer, in which the defendant N. G. Rand admits that he has an unascertained interest, as alleged, in the said estate, but he denies that the plaintiff can maintain this action to recover it.

So the question is whether a judgment creditor whose execution has been returned unsatisfied can maintain an action against an adminis-

(14) trator to subject the distributive share of the judgment debtor in the estate to the satisfaction of the debt.

It is not denied that prior to The Code the judgment creditor could resort to a court of equity only for the purpose of reaching the distributive share; and the question now is, Where is that equity jurisdiction vested since the distinction between the forms of action has been abolished? All actions are now divided into civil actions and special proceedings, and the relief now sought must be by one or the other of these actions. It cannot be by special proceeding, because in *Tate v. Powe,* 64 N. C., 644, the line of demarcation between the two forms of action is laid down, and it is held that any proceeding that under the old mode was commenced by *capias ad respondendum,* including ejectment, or by a *bill in equity for relief,* is a civil action, and not a special proceeding. Whether this is the best line of distinction that can be devised it is not material to inquire, for certainly a bill in equity is not a special proceeding, but a civil action. It follows that the proceeding in our case, being in the nature of a bill in equity, must be a civil action. Both parties agree to this, with the difference that the judgment creditor insists that she can proceed by a new action, while the defendants contend that she must proceed by supplemental proceedings under C. C. P., sec. 264.

The two propositions are not unlike in the respect that they are both for the enforcement of the same right, but by different means, if indeed they are substantially different. It is unnecessary now to speak of the original action. If we clearly ascertain what is a "supplementary proceeding" as established by our Code, its scope and end, we shall have done much to settle the present and similar questions of jurisdiction. We think it clear that proceedings supplementary to execution under the Code of Procedure are a substitute for the former creditor's bill, and are governed by the principle established under the former (15) practice in administering this species of relief in behalf of judgment creditors. The object of the proceeding is to compel the application of property concealed by the debtor, or which from its nature cannot be levied upon under execution, to the payment of the creditor's judgment.

The Code produces but one form of action for the enforcement of private rights, and that action when instituted subsists until the judgment which may be rendered therein shall be satisfied.

Proceedings supplementary to execution are but a prolongation of the action necessary to the final discharge of the judgment, the purpose of The Code being that all matters affecting the complete satisfaction and determination of the action shall be settled in the same action, instead of by a multiplicity of suits.

The only purpose of the creditor's bill was to enforce satisfaction of a judgment out of the property of the judgment debtor when an execution could not reach it, and the only purpose of supplemental proceedings is to attain the same end by the same means. The bill in equity has been abolished and nothing is substituted in its place but the proceedings supplemental to the execution and in aid of it. The office of the former is now performed by the latter, and it would be inadequate, and parties would be in many cases without remedy, unless it could be applied in the same cases and to the same extent by taking hold on all the property and rights of the debtor out of the reach of an execution at law, and applying them in discharge of the debt.

Apart from the reason of the thing, we think this is the proper construction of the provisions of The Code. By section 264, C. C. P., when an execution against the property of the judgment debtor is returned unsatisfied, or where the execution has been issued, and affidavit made that any judgment debtor has property which he unjustly (16) refuses to apply to the satisfaction of the judgment, such court may require the judgment debtor to appear and answer concerning his property. By section 266, upon the affidavit of the judgment creditor that any person has property of the judgment debtor, or is indebted to him in any way exceeding $10, the court may require such person to appear and answer concerning the same. By section 269 the court may order any property of the judgment debtor not exempt from execution in the hands either of himself or any other person, or due to the judgment debtor, to be applied to the satisfaction of the judgment. And finally, by section 270 a receiver may be appointed who shall be invested with all the property and effects of the debtor, and who may collect, preserve and pay out the property and estate of the debtor, or their proceeds, under the direction of the court. The comprehensive and far-reaching nature of supplemental proceedings in our new system of jurisprudence is distinctively shown in the duties and powers of the receiver, by and through whom the court in these proceedings when necessary works out the beneficial results of the system.

When the order appointing the receiver is recorded in the office of the court appointing, and a copy recorded on the execution docket of the county wherein any lands of the judgment debtor sought to be affected are situate, he is from that time vested with all the property and effects, real or personal, of the debtor. C. C. P., sec. 270. The receiver under the order of the court and by virtue of powers conferred upon him, may take possession of the debtor's notes in an insolvent firm of which he was a member; he may maintain an action to set aside a fraudulent conveyance of the debtor's real estate; and may test the validity of any disposition which the debtor may have made of his property; in this

respect standing like an administrator, and like him can assail the illegal and fraudulent acts of the debtor. He may redeem mort-
(17) gages of personal property by paying off the debt, and will be vested with any beneficial interest in real estate devised to the debtor, unless in trust for his use. So he may take possession of real estate mortgaged by the debtor, where he is in possession and receiving the profits, and he may file a bill and sell the same free of liens, pay off the liens and apply the surplus to the payment of the judgment creditor. High on Receivers, 308 to 432; 6 Blatchf. C. C., 235; 16 Wall., 196; 40 N. Y., 383; 23 Wis., 491.

The purpose of The Code thus evidently is to make the remedy by supplemental proceeding a substitute for the bill in equity in all cases, and to the same extent, when the bill could formerly be resorted to merely to enforce an execution at law or as a proceeding in the nature of an equitable *fi. fa.* Unless this be so, it will be difficult to draw a line dividing those cases where supplemental proceedings will lie from those where an original action must be brought, each being brought for the same purpose, to wit, to obtain satisfaction of a judgment when an execution at law has failed.

The first case in our Court where the judgment creditor resorted to supplemental proceedings was *Carson v. Oates,* 64 N. C., 115. There the creditor attempted to subject certain certificates of railroad stock which, as he alleged, belonged to the intestate debtor, but which were held by a third party claiming them as his own. The Court held that neither supplemental proceedings nor an action would lie, for the plain reason that if that railroad stock was part of the estate of the intestate, it was the duty of the administrator to reduce it into possession and apply it in the due course of administration. But, said the Court: "Supplemental proceedings were intended to supply the place of proceedings in equity, where relief was given after a creditor had ascertained his debt by a judgment at law, and was unable to obtain satisfaction by process of law." There is no intimation in the opinion
(18) that supplemental proceedings were not the proper remedy had the intestate been alive.

The next case was *McKeithan v. Walker,* 66 N. C., 95, and is the one mainly relied on by the plaintiff. There the plaintiff had a docketed judgment against Walker, upon which an execution had been issued and returned unsatisfied. Upon supplemental proceedings it appeared that the defendant had executed to one Brown a deed of trust on his land to secure certain debts, with power of sale, etc. It appeared that the land had not been sold, and exceeded the debts in value. Upon this the plaintiff asked for a decree against the trustee requiring him to sell, pay the trust debt, and the residue in discharge of the plaintiff's judg-

ment. The Court held that the case was one where supplemental proceedings did not lie within the intent and meaning of The Code, because the docketed judgment constituted a lien upon the land, which was equivalent to a levy upon property; and that where property has been levied upon by an execution—in this case, a resulting trust—a sale of that property must be made or its insufficiency to satisfy the judgment be otherwise established before the plaintiff can resort to supplemental proceedings. In other words, that case shows that there was land subject to execution by proper proceedings to enforce it, and that it not appearing that the debt could not be made out of the property bound by the execution, a resort to supplemental proceedings was not shown to be necessary, and the application for such proceedings had no ground to rest on. If the decision in *McKeithan v. Walker* is the proper construction of The Code in respect to cases where supplemental proceedings will not lie, and where the party will be put to his action, it follows that supplemental proceedings will lie in no case to subject the judgment debtor's equitable interest in land to sale for the satisfaction of the judgment debt, but that in all such cases the only remedy is by a new action to enforce a sale. And by parity of reasoning proceedings supplemental to execution will be proper in all cases, to wit, (19) where no lien has been created by docketed judgment or levy, and where no property can be reached by execution. This line of distinction divides proceedings to enforce the execution into two classes: one to be proceeded in by original action and the other by special proceeding. It also divides the original equity jurisdiction into two classes to be enforced in two separate actions, to wit, proceedings to reach the judgment debtor's interest in mortgages, trusts, and other equities affecting real estate, to be reached by an action, and the like interest in mortgages, trusts, and other equities affecting personal property to be reached by special proceedings. Whether the delay, expense, and infringement upon the *oneness* of action contemplated by The Code, which must result from this divided jurisdiction, are counterbalanced by its benefits it is needless now to inquire. The decision in *McKeithan v. Walker* was followed by and affirmed in *Hutchison v. Symons,* 67 N. C., 156, *arguendo,* for the same point did not there arise. A judgment had been obtained against the defendant in Mecklenburg and docketed there and in Davidson County. Supplemental proceedings were instituted in the latter county to reach property or debts of the judgment debtor in the hands of third persons. The case was dismissed, not because it did not lie in such case, but because the proceeding had been begun in the wrong county. It was there held by the Court that the return by the sheriff, "This execution is unsatisfied," fell within the very words of C. C. P., sec. 264, and in legal effect was a return of "No goods or chattels, lands

or tenements to be found," and that it thus appearing that the debtor had no property which could be reached by ordinary proceedings, it was a proper case for supplementary proceedings.

The plaintiff, however, was pursuing personal property, and the case therefore steers clear of *McKeithan v. Walker*. The subsequent case of *Rankin v. Minor*, 72 N. C., 424, was also a supplemental pro-
(20) ceeding, and we think it governs the present case. The plaintiff obtained judgment against one Daniel J. Donnell, and instituted supplemental proceedings to subject a distributive share of an intestate's estate, to which he was entitled, to the payment of the judgment. No question was made in the opinion of the Court as to the form of the proceeding, or of the plaintiff's right of recovery. But before the due appointment of the receiver, by which alone a lien can be acquired upon the distributive share, the judgment debtor died. It was held by this Court that the proceeding should be dismissed, because upon the death of the judgment debtor all his estate, including the distributive shares, devolved upon his administrator, to be disbursed in a due course of administration.

Rankin v. Minor is the only decision in our State that a distributive share in the hands of the administrator may be thus subjected, but the same question has been similarly decided elsewhere. *Ross v. Clussman*, 3 Sandf., 676, was a case to reach, by supplemental proceedings, an interest of the defendant given to him by his grandfather, and which was in the hands of the trustees of the will. After the judgment had been obtained and execution had issued and been returned unsatisfied, it was assigned to Wallace, who instituted the proceedings to subject the trust fund. The objection was raised by the defendant that an *action* should have been instituted in the name of the assignee. But, said the Court: "The proceedings supplementary to the execution are all in the action in which the judgment was recovered. Their design is to obtain satisfaction of the judgment, and they are as much proceedings in the original suit as are the executions in which they are founded. There is nothing in the entire chapter (on supplementary proceedings) which countenances the idea that the remedy it provides is a new action or suit."

In our case it is charged in the complaint and not denied in the answer of the defendants, one of whom is the judgment debtor,
(21) that they have in possession as administrators a distributive share of the estate belonging to the debtor sufficient to satisfy the execution. A distributive share of an estate, whether the exact amount is ascertained or uncertain, is properly the subject of gift, sale, or bequest, and can be subjected to the payment of debts. Rev. Code, ch. 7, sec. 20.

Whenever in supplemental proceedings it is necessary to the relief sought that an account should be taken, the court will order it; and when it may be necessary to the preservation of the property, or convenient, a receiver will be appointed, and the property will be taken out of the hands even of an administrator. The courts, however, will not in general interfere with the administration further than to secure the payment of the debt. The receiver is generally clothed with the rights of both the debtor and creditor, and may institute such proceedings, making all such parties as may be necessary to reduce into possession so much of the property of the debtor as will be sufficient to discharge the judgment.

The conclusion is that in this case the plaintiff's remedy is by proceedings supplementary to the execution. We should therefore dismiss the action and remit the plaintiff to her proper remedy but for some facts peculiar to the case which we think should make it an exception to this rule. The action was instituted in the same court where judgment was obtained, and where The Code requires that supplemental proceedings should be commenced. The deviations from supplemental proceedings have been more in form than substance. And as it appears that the judgment debtor is insolvent, yet as an administrator has possession and control over the property in controversy, the Court is unwilling to dismiss the action and thus vacate the restraining order.

The case is therefore remanded, to the end that it may be amended as to form, and that such further proceedings may be (22) had as shall be in conformity to law.

PER CURIAM.. Judgment vacated and cause remanded.

Cited: McCaskill v. Lancashire, 83 N. C., 399; *Bronson v. Insurance Co.,* 85 N. C., 413; *Coates v. Wilkes,* 92 N. C., 379; *Munds v. Cassidey,* 98 N. C., 561; *Hughes v. Commissioners,* 107 N. C., 606.

WILLIAM J. DOUGHTY v. THE ATLANTIC AND NORTH CAROLINA RAILROAD COMPANY.

Practice—Demurrer to Complaint—Misjoinder of Actions.

1. A complaint which contains a cause of action founded on contract and one for an injury to property (in tort) is demurrable under C. C. P., sec. 126. (Division of action under section 131, C. C. P., suggested.)
2. An action for a penalty, given by statute to any person injured, is an action on contract.

3. An action to recover damages for illegally obstructing a navigable river is an action in tort.

FAIRCLOTH, J., being a stockholder in defendant company, did not sit on the hearing of this case.

APPEAL from *Seymour, J.*, at Spring Term, 1877, of CARTERET.

This action was brought to recover damages and also the penalty prescribed by "An act to prevent obstructions to navigation in the waters of Newport River, Carteret County" (Laws 1874-75, ch. 99). It was alleged that Newport River was a navigable stream, and that defendant put a "draw" in its bridge across the same when its road was first built, and kept it in such repair as not to obstruct the passage of masted vessels until that section of the State was occupied by the Federal Army during the War Between the States. And the plaintiff further
(23) alleged that he had been greatly damaged by the act of the defendant in obstructing navigation of said river, and its refusal or neglect to provide a "draw" for the passage of vessels as aforesaid, since 1865; and that he has purchased a farm on said river above the railroad bridge, and has expended a large sum of money in improvements thereon, expecting to have the free navigation of said river in shipping wood, lumber, produce, etc. Wherefore the plaintiff demanded judgment for $500 a year, from September, 1867, to April, 1875; and also for the penalty of $50 a day from April, 1875, until the obstruction to the navigation of said river is removed.

The defendant demurred to the complaint and assigned as cause, . . . (6) that plaintiff cannot maintain this action for a penalty, as the law points out a different mode of redress, and (7) that several causes of action are joined in the complaint, to wit, trespass on the case, and debt; and that said complaint is in other respects uncertain and insufficient.

His Honor sustained the demurrer and dismissed the action. From which ruling the plaintiff appealed.

S. W. Isler for plaintiff.

A. G. Hubbard, W. J. Clarke, and D. G. Fowle for defendant.

RODMAN, J. One of the grounds of demurrer assigned is that the plaintiff in his complaint has joined a cause of action on contract with one for an injury to property, which is not allowed by C. C. P., sec. 126. *Logan v. Wallis,* 76 N. C., 416.

An action for a penalty given by a statute to any person injured is an action on contract. This has been the settled law. 3 Bl. Com., 158, 160, 161. These authorities were cited by counsel for defendant,
(24) and sustain their position on that point. *Judge Story* says an

action of assumpsit will lie upon a statutory liability. Opinion of *Story, J.,* in *Bullard v. Bell,* 1 Mason, 243, 292, 299.

It is equally clear that an action to recover damages for illegally obstructing a navigable river is an action for an injury to property, as it is called in C. C. P., sec. 126, or, as it may more briefly and quite as intelligently be called, an action in tort.

We sustain the demurrer on this ground, and it is unnecessary to consider any others. If when the judge sustained the demurrer the plaintiff had requested the judge to divide the action, we may assume that he would have done so under C. C. P., sec. 131; but this Court cannot do it.

Demurrer sustained. Defendants will go without day and recover costs in this Court.

PER CURIAM. Affirmed.

Cited: Hodges v. R. R., 105 N. C., 172; *Benton v. Collins,* 118 N. C., 199; *Cromartie v. Parker,* 121 N. C., 204; *Land Co. v. Hotel,* 132 N. C., 531; *Hawk v. Lumber Co.,* 145 N. C., 49.

RODMAN, J. The cases of *Roberts v. R. R.* and of *Sanders v. R. R.* are, in all respects material for the present purpose, similar to the above case. The judgment is the same in these as in the above case, and for the reasons stated in the opinion in that case.

---

(25)

GERMAINE BERNARD, ADMINISTRATOR *d. b. n.,* v. JOHN B. JOHNSTON.

Practice—Appeal.

Where on the trial in the court below there were no objections to any part of the evidence and no exceptions to any part of his Honor's instructions, this Court on appeal can only affirm the judgment.

APPEAL from *Cannon, J.,* at Fall Term, 1877, of PITT.

This action was commenced in justice's court for the recovery of $181.89, alleged to be due by account to Francis A. Bernard, the intestate of plaintiff, for services rendered to defendant as clerk in store.

The plaintiff's witnesses testified, among other things, that F. A. Bernard commenced clerking for defendant in 1870, was with him as much as four months of that year, all of 1871, and three or four months of 1872, and that his services were worth $30 per month. The witness

who testified as to the value of the services rendered also stated that he clerked for the defendant at $25 per month immediately preceding the time that Bernard was employed; that he did not quit the service of defendant because the pay was too small; that he was now deputy Superior Court clerk at $40 per month, and that Bernard was a better clerk than he (witness) was.

The defendant introduced no testimony, but insisted before the jury that, according to the account stated by plaintiff, they should render a verdict for the defendant, because the plaintiff admitted in his account that he owed the defendant a book account of $508 and had not adduced testimony sufficient to show that his services were worth the amount claimed ($30 per month), and that the defendant claimed and was entitled to a verdict for the difference between the $508 and the
(26) value of Bernard's services to be fixed by them. The plaintiff in reply argued that he had fully made out his case and had shown that the amount due from the defendant to him was greater than the sum admitted to be due the defendant. Under the instructions of his Honor, the jury rendered a verdict for the defendant.

Judgment. Appeal by plaintiff.

Gilliam & Gatling for plaintiff.
Jarvis & Sugg for defendant.

FAIRCLOTH, J. The defendant's account was admitted by the plaintiff, and the only issue was the value of the services rendered by plaintiff's intestate. The jury ascertained this and balanced the accounts and gave a verdict for the difference in favor of the defendant.

Neither party objected to the admission of any part of the evidence nor to any part of his Honor's instructions to the jury, and we do not see any error in his instructions. The value of the services and the weight of evidence were matters alone for the jury to determine, and we find nothing to do except to affirm the judgment. The grounds assigned for a new trial were in the discretion of the court below, and we do not consider them. Let judgment be entered here for the defendant.

PER CURIAM. No error.

(27)

REUBEN HENRY v. W. C. SMITH, THOMAS J. SMITH, AND FRANCIS LYNCH.

Practice in Supreme Court—New Trial for Newly Discovered Testimony.

1. This Court has the power in a proper case to grant a new trial for newly discovered testimony.
2. But in such case it must be shown that since the former trial testimony has been discovered which was then unknown, which is probably true, and if it had been produced would have caused a different judgment, which could not have been known in time for the former trial by any reasonable diligence, and that diligence had in fact been used to discover it.

SMITH, C. J., having been of counsel, did not sit on the hearing of this case.

MOTION for a new trial for newly discovered evidence, made by plaintiff and heard at January Term, 1878, of the SUPREME COURT.

The plaintiff filed an affidavit stating that he had discovered (since the decision in this case, 76 N. C., 311) that at the time of the purchase of the land in controversy the defendant Thomas J. Smith had actual notice of the mistake in the deed and knew that rent had been paid to the plaintiff by the other defendants; that when said land was sold by the auctioneer, it was sold subject to a lease and claim for rent of the affiant; that John W. McGregor, who acted as the agent of said defendant, knew the conditions of the sale and bought the land subject to the same; and that this evidence was not known to the affiant at the time the case was tried in the Superior or Supreme Court. Affidavits of S. D. Ballard and Thomas Bird were also filed, corroborating (28) substantially the statements made by the plaintiff.

Gray & Stamps and Dargan & Pemberton for plaintiff.
No counsel for defendants.

RODMAN, J. This case was decided in this Court at January Term, 1877 (76 N. C., 311). The object of the action was to reform a lease made by the plaintiff to one Lynch, on the ground that a clause for the payment of an annual rent had been omitted by mistake.

The estate under the lease had been assigned to the defendant W. C. Smith, with notice of the alleged mistake, and by him to Thomas J. Smith for value, but there was no evidence that he had notice of the mistake. It was held that the plaintiff had no equity to have the lease reformed as against him.

At the June Term, 1877, the plaintiff moved for a rehearing of the judgment of the previous term, and for an order remanding the action for a new trial in the court below, upon the ground that since the decision of this Court he had discovered testimony which would prove notice to Thomas J. Smith of the alleged mistake in the lease before his purchase.

It is conceded that this Court has the power in a proper case to grant the motion. It was so held in *Bledsoe v. Nixon,* 69 N. C., 81, and that case comes within the principle of the acknowledged rules of practice in courts of equity on applications for rehearing and bills of
(29) review. 3 Daniel Ch. Pr., 1724, 1732, 1736, and cases there cited.

But it is clear that unless the granting of such motions be rigidly restrained by the established rules applicable to such cases it will tend greatly to protract litigation, which is against the interest of the public. This danger is pointed out and carefully guarded against in the opinion of the Court in *Bledsoe v. Nixon.*

The cases in which a new trial may be granted in the inferior courts for newly discovered testimony have been defined in a great multitude of concurring decisions in all the States, which may be found cited in 9 U. S. Dig. (N. S.), under the head, *New Trial,* ch. 2, subdiv. 6, sec. 2079 *et seq.*

We need only refer more particularly to *Bledsoe v. Nixon; Holmes v. Godwin,* 69 N. C., 467, and *Shehan v. Malone,* 72 N. C., 59. These rules apply with greater force to an application in a court of appeals where the case has been heard after all the points of controversy have been developed, and the parties have had *ample time to discover all the testimony,* and where the decision may be expected to be an end of the litigation. To make such an application successful, it must be shown that, since the former trial, testimony has been discovered which was then unknown, which is probably true and if it had been produced would have caused a different judgment, and, as specially pertinent to the present application, that it could not have been known in time for the former trial by any reasonable diligence, and that diligence had in fact been used to discover it. All these requisites were present in *Bledsoe v. Nixon.*

In the present case the plaintiff swears that since the decision in this Court he has discovered that the land was sold by the auctioneer subject to the payment of rent, and that McGregor, who bid it off for the defendant, did so with knowledge of that condition and of the plaintiff's claim (we suppose he means of the claim alleged in this action). In support of this statement, he reads an affidavit of Ballard that he was present at the sale, and that it was announced that the land was sold "sub-

ject to the lease," and that McGregor "knew of the lease and (30) the claim of the plaintiff." It will be observed that Ballard does not say that McGregor knew of the plaintiff's claim to an annual rent. It was never denied that he knew of the lease, but it appeared from the lease that the term had been sold for a sum in present cash, and was not subject to an annual rent. The claim of the plaintiff which he is said to have known of is not described. It may have been a claim to the reversion, which is not denied. Thomas Bird corroborates the statement of Ballard, but does not extend it. The testimony of these affiants does not come up to the matter to be proved. Even if it did, the plaintiff does not allege that before the decision in this Court he used any diligence or indeed made any attempt whatever to obtain their testimony, or that of any other person, to prove notice to Thomas J. Smith of any mistake alleged to have been made in writing the lease, or that it was subject to any encumbrances not apparent on its face.

Shehan v. Malone, 72 N. C., 59 (not cited on the argument), is very much in point. This fact of notice was distinctly put in issue by the pleadings, the attention of the parties was called to its materiality, and if it could have been proved by a diligent inquiry in the neighborhood of the land, and the plaintiff failed to make it, he was guilty of negligence, and has no claim for another trial.

PER CURIAM. Motion refused.

Cited: Carson v. Dellinger, 90 N. C., 230; *Simmons v. Mann,* 92 N. C., 17; *S. v. Starnes,* 94 N. C., 982; *Sikes v. Parker,* 95 N. C., 235, 237; *Black v. Black,* 111 N. C., 303; *Turner v. Davis,* 132 N. C., 189.

---

(31)

F. M. PHILLIPS v. JOHN HOLLAND.

Practice—Amendment of Process.

1. Process issuing from a court is not subject to amendment when third persons have acquired rights and the amendment is in such a matter that their rights would be affected by it.
2. Where process issued to one county went into the hands of the sheriff of such county, who did not execute it or make any return upon it, and thereafter the same process was altered by the clerk who issued it originally, by directing it to the sheriff of another county: it was *Held,* that it was error in the court below to allow the process to be amended by restoring it to its original form.
3. It is not error in a court to suspend the trial of an action in order to consider a motion to amend process in another case affecting the action on trial.

MOTION by plaintiff to amend process, heard at chambers in Salisbury, on 10 May, 1877, before *Kerr, J.*

This motion was made in an action of claim and delivery instituted in Davie Superior Court by the plaintiff against the defendant for the recovery of two mules alleged to be illegally detained by the defendant, a resident of Davidson County. From the evidence his Honor found the following facts:

The summons was issued on 27 April, 1872, and on the same day, the plaintiff having filed a proper affidavit and sufficient bond, the clerk of the Superior Court of Davie also issued a requisition for the seizure of the mules. This process was directed to and received by the sheriff of Davidson, but neither the summons nor the requisition was ever executed by him, and no written return was indorsed thereon. Thereupon, and subsequent to the commencement of this action, the plaintiff brought an action against the sheriff of Davidson for damages alleged to have been sustained by reason of his failure to execute the process as afore-
(32) said, which action is still pending.

About three weeks after said process was issued a deputy sheriff of Davidson went with the plaintiff to the house of said clerk of Davie Superior Court, and upon his (sheriff's) statement that he had been informed the mules were at a certain place in Forsyth County, the requisition was altered by the clerk by striking out "Davidson" and inserting "Forsyth," and afterwards the said deputy sheriff altered the summons in the same way. The original papers thus altered were sent to the sheriff of Forsyth. It further appeared that the mules had not been taken to Forsyth, but had been carried off in another direction by the defendant and sold.

Upon these facts his Honor allowed the motion and ordered the process to be restored to its original form, so as to read as it did before the alteration and when it was placed in the hands of the sheriff of Davidson. The defendant appealed from the ruling of the court, and also because said motion was heard during the trial of the action brought by this plaintiff against the sheriff of Davidson for damages as aforesaid.

J. M. Clement and J. E. Brown for plaintiff.
Bailey & McCorkle for defendant.

RODMAN, J. The alteration in the summons and requisition was not the act of an unauthorized person, in which case it might have been stricken out and the original reading restored; but it was made
(33) by the clerk who issued them, at the instance of the plaintiff. when they were altered by being directed to the sheriff of Forsyth, they became new and original process of the same force and effect as if

they had been originally written as they then stood. Whether the alteration relieved the sheriff of Davidson from any liability previously incurred by him it is unnecessary to say. When these papers were delivered to the sheriff of Forsyth he became bound to obey them. The case says that no written return was ever made on them, but it does not appear that the sheriff of Forsyth did not act on them in some way, although he did not seize the mules. If he did act on them, he is clearly entitled that they shall remain as they were when in his hands, for his protection and as proof of his authority. Even if he did no act under them, we think that both he and the defendant in them, and the sheriff of Davidson, had acquired a right that they should remain as they were when in the hands of the sheriff of Forsyth, as evidence of the fact that they had been in his hands, and that such a suit had been begun.

It is not denied that process may in many cases be amended, but not where third persons have acquired rights, and the amendment is in such a matter that their rights may be prejudiced by it. *Bank v. Williamson,* 24 N. C., 147; *Smith v. Low, ibid.,* 457.

The interest of the sheriff of Davidson that the process shall remain as it was before the proposed amendment was made is like in kind and, for aught that we can see, equal in degree with that of the plaintiff to effect the amendment. It may be that the plaintiff without the amendment may be allowed to prove the facts upon which he relies to fix liability on the sheriff of Davidson; and it may be that if the amendment were made, the sheriff would still be allowed to prove any facts connected with the several forms of the process which he may deem material. We have no opinion on these questions. The amendment would certainly shift the burden of proof of a material fact from the plaintiff, and throw it on the sheriff, to the benefit of which we do not see that the plaintiff has made out any superior claim, and in this respect (31) he comes within the principle of the cases cited.

It is not like a motion to amend a record so as to enable it to speak the truth, when by any inadvertence it does not, which is a matter of right. There is no mistake here. The process when issued the last time was just as the plaintiff wanted it, and it had vitality and force. For these reasons we think the judge erred in allowing the amendment.

Such being our opinion on this question, it is unnecessary to consider the others argued here. We may say, though, that we see nothing irregular in the judge suspending the trial of a case in order to consider the motion to amend. The order of procedure in a court must be almost entirely in the discretion of the presiding judge, and it is not pretended that there was in this case any manifest abuse of that discretion.

There was error in allowing the amendment. Let this opinion be

certified to the Superior Court of Davie, in order that the error may be corrected, and the process restored to the tenor it had before the amendment was made. The appellant will recover costs in this Court.

PER CURIAM. Reversed.

Approved: Henderson v. Graham, 84 N. C., 498; *Martin v. Young,* 85 N. C., 157.

---

(35)

MOSES S. HOLMES v. JOHN FOSTER, JR., ADMINISTRATOR, AND OTHERS.

Practice—Judgment Against Administrator.

In an action against an administrator upon a note executed by him for a debt of his intestate, when the intestate died 26 November, 1869, and administration was granted upon his estate 13 December, 1869, the Superior Court had jurisdiction to give judgment against the administrator only for the purpose of ascertaining the debt; it had no authority in such action to investigate his accounts or to fix him with assets by any judgment.

APPEAL from *Cloud, J.,* at Fall Term, 1876, of ROWAN.

This was an action brought on 6 October, 1874, to recover the value of a promissory note under seal executed by the defendants to the plaintiff, for a debt due by their intestate, and the case was referred to the clerk of the court to take an account of the administration of the estate of the defendants' intestate (John Foster, Sr.). The defendants' intestate died on 26 November, 1869, and the defendants were appointed administrators on 13 December, 1869. His Honor sustained the exceptions filed to the report of the referee, and gave judgment against the defendant administrator for the amount alleged to be due on said note; and it was also adjudged that the defendant had been guilty of a *devistavit,* in that it appeared that he was one of the next of kin of the intestate and had ample funds to pay said note to plaintiff, and without paying the same, he distributed the personal estate amongst the next of kin. From which judgment the defendants appealed.

(36) *J. M. McCorkle and A. W. Haywood for plaintiff.*
Kerr Craige, A. Jones, and J. M. Clement for defendants.

FAIRCLOTH, J. This action was commenced after 1 July, 1869, and before the act of 1876-77, ch. 241, and the court had jurisdiction to give judgment against the obligors, and for the purpose of ascertaining the amount of the debt against the administrator; but it had no authority

to investigate his accounts or to fix him with assets by any judgment. Bat. Rev., ch. 45, sec. 95. *Vaughn v. Stephenson,* 69 N. C., 212; *Dunn v. Barnes,* 73 N. C., 273.

That part of the judgment which ascertains the debt as against the administrator is affirmed, and the other part is reversed. The defendant administrator will recover his costs in this Court.

PER CURIAM. Reversed.

Cited: Grant v. Bell, 91 N. C., 496.

---

(37)

WILLIAM H. PEARCE v. LUKE MASON.

Practice—Pleading—Defective Complaint—Answer—Issues—Verdict—Amendment.

1. A complaint alleged that A. contracted to sell a lot of land to the defendant and took his notes for the price, and afterwards A. conveyed the land to the plaintiff, who brought suit for the amount of the notes: *Held,* that the complaint is demurrable in that it failed to allege the assignment of the notes by A. to the plaintiff.
2. An allegation of such assignment in the answer of the defendant supplies the omission and gives the plaintiff a good cause of action.
3. When the defendant in such action in his answer alleges partial payments, including a certain sum for the occupation of the premises by the plaintiff, which allegation is denied in plaintiff's replication, and no issue thereon is submitted to the jury, this Court on appeal will arrest the judgment and remand the case in order that that issue may be tried by a jury.
4. The general rule is that a party must present his defense in apt time by tender of issues, or else it must be held to be waived; but this rule should not be applied to a case wherein the complaint is not one on which a judgment can be given.
5. Defects in complaints are sometimes held to be cured by verdict, but not in cases where there is a total omission of an essential allegation in the complaint.
6. In such case the defect in the complaint could have been cured by an amendment after verdict under C. C. P., sec. 132.

APPEAL from *Eure, J.,* at Fall Term, 1877, of CRAVEN.

The plaintiff alleged that the defendant entered into possession of a certain lot in New Bern under a contract of purchase with Mrs. Mary Chadwick, who agreed upon the payment of a certain sum of money to execute a deed for the same; that if the payment was not made as stipulated in the contract, then it should be null and void; that Mrs. Chadwick

subsequently conveyed to the plaintiff, and that the defendant had failed to pay any part of the purchase money. Wherefore the plaintiff demanded judgment for the amount of the notes given by the
(38) defendant to Mrs. Chadwick for the purchase of the land.

In his answer the defendant, after admitting the execution of the notes, alleged that in pursuance of an agreement in writing between the plaintiff and himself, the plaintiff bought the lot of Mrs. Chadwick and took an assignment of the notes and agreed that defendant might carry on the business of carriage making, etc., on the lot, and with the profits arising therefrom pay off said notes and get a deed; that he had previously paid a part of the purchase money to Mrs. Chadwick, and that the plaintiff had received from him a considerable sum in work done for the plaintiff; that the lot had increased in value by reason of improvements, and that he had paid more than the purchase money, and demanded judgment for the excess.

The plaintiff replied and denied the averments of the defendant, and alleged that he did purchase the lot of Mrs. Chadwick, but not in pursuance of any agreement with defendant, and that no such agreement was ever made between them.

Upon the issues submitted to the jury, it was found that the plaintiff was the owner of the notes which were given for the purchase of the land described in the complaint, and that defendant had paid plaintiff on said notes the sum of $650, of which sum $100 was for work done for plaintiff. Thereupon the court gave judgment for plaintiff for $1,319.78, balance due upon the notes, and appointed a commissioner to sell the premises and apply the proceeds to the payment of the judgment, etc., from which the defendant appealed.

Green & Stevenson for plaintiff.
Battle & Mordecai and W. J. Clarke for defendant.

(39) RODMAN, J. This is a case which has been so obscured by bad pleading and careless procedure, on both sides, as to make it extremely difficult to be dealt with, without danger of doing injustice to one or the other of the parties. A simple question of fact, which appears to be the only question about which the parties really differ, has been unnecessarily complicated with a perplexing question of practice. In such a case, where there are no decisive precedents or rules, and the equity of neither party clearly appears, all that we can do is so to order that, as far as we can effect it, no injustice shall be done to either party; and if we happen to fail in this purpose, the blame must fall, not upon us, whom the parties have united to mystify and befog, but on the parties whose neglect of the rules of pleading and procedure has produced the difficulty.

The motion is to arrest or set aside the judgment on the ground that it is not warranted by the complaint. The complaint states that Mrs. Chadwick agreed to sell to defendant a certain piece of land, and took his notes for the price, and that she afterwards conveyed the land to the plaintiff. It does not say that she assigned the notes to the plaintiff, yet it demands a judgment for the amount of the notes. The complaint was demurrable, and would not authorize the judgment demanded or that which was given.

The defendant, however, answers and carefully alleges that the notes were assigned to the plaintiff, thus supplying the plaintiff's omission and giving him a good cause of action. The defendant also says he has paid the notes, and in a schedule attached to his answer states many partial payments. In the schedule of payments is the following: "For use of part of the premises by Levi Guion, placed in possession by the plaintiff, and who occupied the same for three years, $400." More will be said of this claim presently. (40)

The plaintiff, apparently not being willing to accept the defendant's aid in making out his case, and not being satisfied to rely upon the replication implied by C. C. P., except as to a counterclaim, replies and carefully denies each allegation of the answer, including that which alleged that the notes had been assigned to him. Such being the pleadings, issues were submitted to a jury:

1. Was the plaintiff the owner of the notes?
2. How much has been paid on them?

The jury found in favor of the plaintiff, that he was the owner of the notes on which he asked judgment, and that $650 had been paid on them. On this verdict the judge gave judgment against defendant for the unpaid residue of the debt, being nearly $1,400, and ordered the land to be sold, etc. It does not appear that either party asked that any issue should be submitted touching the possession of a part of the land by Guion under the authority of the plaintiff. If the defendant meant to rely on his claim arising out of this possession, it was negligence in him not to have asked that an issue upon it should be submitted. He complains in this Court that injustice has been done him, in that this sum was not allowed him as a payment, or as a recoupment. We take it to be law, that if a mortgagee (and that was substantially the character of the plaintiff) take possession of any part of the mortgage property, the rents or profits received by him must go in diminution of the mortgage debt. If the fact be as the defendant alleges, his right is clear. His difficulty is that he did not make this defense on the trial, when it was open to him. The general rule is unquestionable, that a party must present his defense in apt time. To omit presenting a defense when it is known to a defendant must be held on every principle

(41) of legal policy and of equity a waiver of it; and such a negligent omission furnishes no ground for an application for a new trial. The policy and the general rule of the law are, that there should be an end of litigation, and that judgment must be final. We should not hesitate to apply that rule in this case if the complaint were one on which a judgment could be given. The defect has been stated. It was cured by the verdict so far that the judge would have allowed the plaintiff even after verdict to amend his complaint by stating that the notes had been assigned to him, as C. C. P., sec. 132, authorizes. But this was not done, and the complaint remains yet defective. I am aware that defects in complaints are sometimes held cured by verdicts without the necessity of amending the complaint. But without minutely inquiring into the rules on that subject, it seems to us that they cannot apply where there is a total omission of an essential allegation. We cannot allow the amendment in this Court. On the whole, we think we are required to arrest the judgment. This, however, does not set aside the verdict, which, as far as it goes, will stand. The plaintiff may apply to the judge below for leave to amend his complaint in the matter in which it is defective, and either party may apply to have an issue made up and tried, as to whether plaintiff took possession of any part of the land, and received any rents or profits therefrom, and the amount thereof, if any.

The allegation by the defendant, that he has made improvements on the land since his contract for the purchase, is immaterial. If he has thereby increased the value of the land, he will receive the benefit thereof on a sale. We think also that if the judge of the Superior Court shall hereafter order a sale of the land to pay any sum which may be found owing to the plaintiff, it will be proper under the circumstances of this case, as they now appear to us, to allow the defendant a reasonable time within which to satisfy the debt, before a sale. What is a reasonable time must depend a good deal on the circumstances, (42) and must be left mostly to the discretion of the judge. This Court has indicated that, in general, three months would be reasonable.

Judgment set aside and case remanded to be proceeded in according to this opinion. We think neither party ought to recover costs in this Court.

PER CURIAM. Error.

Approved: Johnson v. Finch, 93 N. C., 209.

Distinguished: Grant v. Burgwyn, 88 N. C., 102; *Robeson v. Hodges,* 105 N. C., 50.

JAMES NEIGHBORS v. J. J. HAMLIN, EXECUTOR.

Practice—Executors—Requiring Them to Give Bond—Removal from Office—Sufficiency of Affidavit.

1. The insolvency of an executor is not a sufficient cause for requiring him to give bond and, failing in that, for his removal, unless such insolvency was unknown to the testator or occurred after his death.
2. An affidavit upon which an application is based for requiring an executor to give bond or for his removal is insufficient if it states merely a belief that such executor will misapply the funds which may come into his hands; it should set out the facts or circumstances or state the reasons upon which such belief is grounded.

APPLICATION of the plaintiff to require the defendant as executor of B. J. Crawley to give bond, heard at Fall Term, 1877, of RANDOLPH, before *Buxton, J.*

This proceeding was commenced before the clerk of said court upon an affidavit of the plaintiff, to the effect that the defendant's testator was indebted to him in a certain sum, and that by reason of the alleged insolvency of the defendant, and the fact that he had given no bond for the faithful performance of his duties as executor, the plaintiff was in danger of losing his debt by a misapplication of the proceeds of sale of the testator's property; to which affidavit the defendant filed an answer denying the same. The clerk adjudged that unless (43) the defendant should execute a bond by a certain time he should be removed from his office as executor. From this order the defendant appealed, and upon the hearing before his Honor the proceeding was dismissed on the ground that an executor was not liable to be removed for the causes alleged by the plaintiff. Judgment. Appeal by plaintiff.

A. W. Tourgee and J. N. Staples for plaintiff.
Scott & Caldwell for defendant.

FAIRCLOTH, J. If an executor becomes insolvent after the death of the testator, or if his insolvency was unknown to the testator before his death, or if he is a nonresident, or if he applies the funds of the estate to his own use, or if he converts his own property into money, notes, etc., and thereby produces a reasonable doubt in regard to the safety of the estate, or if his character and business habits shall become worse after the death of the testator, and thereby such a doubt is produced, or if by his *negligence* the safety of the property of the estate is jeopardized: in these and like instances it is in the power and it is the duty of the court to interfere by requiring the executor to give bond with sufficient

sureties, and, failing in this, to remove him from his office and appoint an administrator, or, pending litigation, a receiver, to receive and guard the property. But the poverty or insolvency of the executor, we have frequently said, will not authorize the court to remove him against the will of the testator. *Fairbairn v. Fisher,* 57 N. C., 390, and later cases.

The plaintiff in his affidavit alleges that he is a creditor of the estate, and that the defendant is "wholly insolvent and irresponsible,"
(44) and that if he should collect certain funds, "this affiant believes that the defendant would misapply said money and would not pay off the debt of the affiant."

The defendant, answering, says that he received no property or funds as executor, and has committed no maladministration or loss, and that his condition in regard to property and credit has not been changed for the worse since the death of the testator, but that it is improved.

Assuming the truth of the plaintiff's allegation, as if the defendant had demurred to it, we are then of opinion that the plaintiff is not entitled to the order asked for. We have seen that the poverty alone of the defendant will not do, and the latter clause of the affidavit will not do, because it alleges only affiant's belief without setting forth any fact or circumstance, or any reason for his belief. This is necessary in order that the court, standing between the parties, may see whether the plaintiff's complaint is well founded or not. Men differ widely in their opinions; some believe readily on slight provocation, others do not; and it is plain that the parties to this proceeding do not believe alike. Any other rule would be inconvenient. It would expose one to the mere stated belief of another, and would not expose that other one to the pains of perjury, even if his statement was entirely untrue. The distinction is well illustrated in applications for attachments, arrest and bail, etc., in which some sufficient act accomplished must be averred, or if mere apprehension or belief that loss or injury will come is the gravamen of the complaint, then the affiant is required to set forth facts or circumstances in support of his belief. This is our conclusion on the plaintiff's case, without giving any weight to the denial of the defendant.

PER CURIAM. Affirmed.

Cited: Camp v. Pitman, 90 N. C., 618.
Distinguished: Barnes v. Brown, 79 N. C., 407.

(45)

JOSEPH A. MABRY v. MARCUS ERWIN AND OTHERS.

Practice—Judgment by Default—Former Judgment.

1. A judgment by default rendered by the Superior Court in term-time in an action upon a former judgment or decree is regular without proof of such judgment or decree being made before the clerk; section 218 of The Code is suspended by the act suspending The Code. Bat. Rev., ch. 18.
2. A motion made after the expiration of a year to set aside a judgment under C. C. P., sec. 132, cannot be allowed.

MOTION to set aside a judgment, heard at Fall Term, 1877, of BUNCOMBE, before *Schenck, J.*

The plaintiff obtained a judgment final by default against the defendants at a former term of said court, in an action based upon a former judgment or decree of the late court of equity. His Honor allowed the motion upon the ground that the judgment was irregular, being of opinion that the plaintiff was not entitled to said judgment by default without some proof of the former decree made to the clerk as provided in C. C. P., sec. 217. From which ruling the plaintiff appealed.

J. H. Merrimon for plaintiff.
Battle & Mordecai for defendants.

READE, J. An irregular judgment, that is to say, a judgment rendered contrary to the course and practice of the court, may be set aside at any time, even after the term of the court which rendered it. This was not controverted. And the judgment in this case being rendered by default final upon a former judgment, it was suppossed by his Honor to be irregular, because contrary to the provisions of C. C. P., (46) sec. 217.

His Honor was, however, mistaken in supposing that that section of The Code governed the practice in that case, because it had been suspended by the subsequent statute, Bat. Rev., ch. 18, suspending The Code. And the judgment was not rendered by the clerk under C. C. P., sec. 217, but by the court in term-time, and was in all respects regular. It was error, therefore, to set it aside.

PER CURIAM. Reversed.

NOTE.—In a case between the same parties at the same term of said court, before *Schenck, J.*, the motion was denied upon the ground stated in the opinion, as follows:

READE, J. An irregular judgment may be set aside at any time, but a regular judgment cannot be set aside after the term of the court which

rendered it. So the law stood before C. C. P., and so it stands now, except that under C. C. P., sec. 133, even a regular judgment may be set aside for mistake, inadvertence, surprise, or excusable neglect of the party against whom it is rendered, if motion is made within one year.

More than a year had expired before the motion was made in this case, and, therefore, it cannot be allowed.

PER CURIAM. Affirmed.

Cited: Askew v. Capehart, 79 N. C., 19; *Monroe v. Whitted, ib.,* 510; *University v. Lassiter,* 83 N. C., 42; *Mabry v. Henry, ib.,* 299; *McLean v. McLean,* 84 N. C., 369; *Stradley v. King, ib.,* 639; *Wynne v. Prairie,* 86 N. C., 77; *Rogers v. Moore, ib.,* 88; *Parker v. Bledsoe,* 87 N. C., 224; *Cook v. Moore,* 100 N. C., 295.

---

(47)

FANNIE WILLIAMS AND ANOTHER v. R. W. THOMAS, ADMINISTRATOR.

Practice—Trial—Handing Papers to Jury.

It is error for a court upon the trial of an action to hand to the jury upon their retirement (when it is objected to) papers which have been read as evidence in the case.

APPEAL from *Cox, J.,* at Fall Term, 1877, of DAVIDSON.

It was alleged that an award in a certain suit was filed at Spring Term, 1867, of the late court of equity for Davidson County, to which no exceptions were taken, and upon which it was decreed that March & Hampton, plaintiffs, should have judgment against John W. Thomas, defendant (intestate of defendant in this action), for $1,409.25, and that execution should issue therefor; that said decree was subsequently assigned to the plaintiffs, who brought this action to recover the amount thereof. The defendant set up certain counterclaims, and alleged that the balance of said amount had been paid to the attorneys of said March, who were fully authorized to receive the same.

At the trial the following issues were submitted to the jury:

1. Did March assign his interest in said decree to the plaintiff Williams before the institution of this action? Answer: Yes.

2. Did Hampton so assign his interest in same to the other plaintiff, Clouse? Answer: Yes.

3. If so, was such assignment made to hinder, delay, and defraud the creditors? Answer: Yes.

4. Did the intestate, John W. Thomas, in his lifetime, pay off and fully discharge said decree? Answer: Yes.

That portion of his Honor's charge to the jury applicable to the points touched upon in the opinion of this Court was, "that the jury should inquire whether_____were the attorneys of said M., and if they were, then the jury should inquire into their duties as attorneys, and what they were; and that the selection of an (48) attorney (by his client) to act as arbitrator did not necessarily revoke his power as attorney; but that would depend upon the intent, which the jury were to decide."

As the jury were about to retire to make up their verdict, his Honor, after objection by counsel for plaintiff, permitted certain papers which were in evidence to be handed to the jury, who retained them until the verdict was rendered.

The issue of payment having been found in favor of the defendant, there was judgment accordingly, and the plaintiffs appealed.

W. H. Bailey for plaintiffs.
J. M. McCorkle for defendant.

FAIRCLOTH, J. Does the reference of an action by consent to the attorney in said action for arbitration *ipso facto* revoke his authority as an attorney? This is an interesting and, in the present case, an important question. We were about to proceed to consider the question, but finding that we are compelled to order another trial on another exception, and inasmuch as his Honor submitted the question to the jury as one of intent, without a distinct issue, we have concluded not to pass upon it at present.

Was it a question of law or of fact? This, of course, depends on the evidence; and if the latter, was there any evidence of the intent to go to the jury? We make these suggestions, but do not mean any expression of opinion until the facts are established by another trial.

His Honor handed important papers to the jury as they (49) retired, which had been read in evidence, to which the plaintiffs objected, but the jury were allowed to keep the papers until the verdict was rendered. Whilst the decisions in different States of the Union do not agree on this subject, the practice has never been recognized in this State, and the rule against it has been uniform, unless by consent. See the following cases for the reasons on the subject: *Outlaw v. Hurdle,* 46 N. C., 150; *Watson v. Davis,* 52 N. C., 178; *Burton v. Wilkes,* 66 N. C., 604.

PER CURIAM. Error.

Cited: Martin v. Knight, 147 N. C., 574; *Nicholson v. Lumber Co.,* 156 N. C., 68.

CAROLINA CENTRAL RAILWAY COMPANY v. J. S. PHILLIPS AND OTHERS.

Practice—Costs—Proceedings to Condemn Land.

Where a railroad company institutes a proceeding before a Superior Court clerk to condemn the defendant's land, and appealed to the Superior Court from the assessment of damages made by the commissioners as excessive; and upon a jury trial the amount of damages was reduced and judgment rendered therefor in favor of defendant: it was *Held*, that no part of the costs were taxable against the defendant.

ACTION, removed from Mecklenburg and tried at Fall Term, 1877, of CABARRUS, before *Kerr, J.*

This proceeding was instituted by the plaintiff to condemn the land of defendants through which its road was built, and commissioners were appointed by the clerk of the Superior Court under an act of Assembly who assessed damages in favor of the defendants in an amount
(50) which was alleged by the plaintiff to be excessive. An appeal was taken from the report of the commissioners to the Superior Court, and a jury trial had. The verdict of the jury sustained the exceptions to the report of the commissioners in respect to excessive damages, and the amount of said damages was reduced by the verdict.

Judgment was given in favor of the defendants for the amount so assessed, and also that the costs be taxed equally against each party to the action.

On the opening of the case, the defendants insisted that they had the right to open and conclude, but his Honor held that the plaintiff was entitled to that privilege, as the burden was upon it to show that the damages assessed by the commissioners were excessive.

The defendants appealed from so much of the judgment as required them to pay half the costs.

A. Burwell, W. J. Montgomery, and J. D. Shaw for plaintiff.
Shipp & Bailey, Wilson & Son, and R. Barringer for defendants.

READE, J. To enable the plaintiff to condemn the land of the defendant, its charter prescribes that it may file a petition before the clerk of the Superior Court, and the clerk may appoint commissioners, and they may appraise the damage to be paid to the defendant and report to the court from which the commission issued; and if either party is dissatisfied, there may be an appeal to the Superior Court. Laws 1872-73, ch. 75, sec. 9.

It will be noticed that the provision is very meager and unsatisfactory, and if it stood alone would be very difficult to administer. How the appeal is to be effected and what is to be done in the Superior Court is not stated; nor does it come under the general head of (51) appeals from justices of the peace, or from the Superior to the Supreme Court. Probably it was not made more specific under the idea that the general law for all such cases would govern, as it manifestly ought to govern, because it would produce interminable confusion if for every railroad and corporation there should be a separate and distinct system of procedure and trial. This seems to be the view taken by the counsel for the plaintiff, as we see in his brief the position taken that "the charter is not inconsistent with the general railroad act. Bat. Rev., ch. 99, secs. 16, 17."

The general act provides that the plaintiff shall file its petition and the court shall appoint commissioners and they shall appraise and report to the next court in term-time, and that either party may except, and the court shall pass upon the exceptions and may refer it back to the same commissioners or to others, and the second report is to be final and conclusive. So it seems that there is no express provision in the general law for a jury, nor for an appeal from the report of the commissioners to the Superior Court. There cannot be an appeal, in its ordinary acceptation, from the commissioners to the Superior Court, for the reason that they are not a *court,* and for the further reason that they make their report directly to the Superior Court, just as a referee or master does.

It may be, however, that the parties have the right to have a jury trial. And there seems to have been no objection made to a jury trial in this case. And in *R. R. v. Wicker,* 74 N. C., 220, there was a jury trial by consent.

Taking it, then, to be an ordinary jury trial to ascertain the damage to the defendant's land, and the defendant having a verdict and judgment, the costs follow as a matter of course. There was error, therefore, in so much of the judgment below as required the defendant (52) to pay a portion of the costs.

We are inclined also to the opinion that the defendant ought to have been allowed to open and conclude, and it is important that the rules of practice should be observed; but it is only a rule of practice, and the amount in controversy is so small that we are satisfied that the interests of the defendant would not be subserved by granting a *venire de novo* on that ground. Indeed, we assume that an appeal to this Court would not have been taken by the defendant upon that ground, if it had not been for the more important error of requiring him to pay a portion of the costs. A *venire de novo* is therefore refused.

The judgment below will be reformed so as to give judgment for the defendant for the damages assessed by the jury; and the defendant will recover full costs.

There will be judgment here in accordance with this opinion. And if the parties do not agree upon the amount, the clerk of this Court will ascertain and report, for which he will be allowed $5.

PER CURIAM. Judgment accordingly.

Cited: R. R. v. Love, 81 N. C., 436; *R. R. v. Church,* 104 N. C., 532; *R. R. v. Parker,* 105 N. C., 249; *Skinner v. Carter,* 108 N. C., 108; *Wooten v. Walters,* 110 N. C., 259; *Worthington v. Coward,* 114 N. C., 291.

---

(53)

JOHN G. CHAMBERS, ADMINISTRATOR OF JOHN BRIGMAN, v. G. F. PENLAND AND OTHERS.

Practice—Summary Judgment—Parties—Infant Defendants—Irregularities in Special Proceeding—Remedy Against Improper Judgment.

1. Under Rev. Code, ch. 31, sec. 129, a summary judgment can be rendered in the probate court against the purchaser and his sureties on a note executed to secure the purchase money for land sold by an administrator for assets.
2. The general guardian of infant defendants is the proper person upon whom service of process against such infants should be made.
3. Irregularities in the preliminary proceedings in an action to sell land for assets are cured by the parties defendant coming in upon notice after a sale and consenting to its confirmation.
4. The remedy of a defendant aggrieved by a judgment is not by injunction, but by an application to the court wherein the judgment was rendered, for relief.

MOTION for an injunction, heard at Fall Term, 1877, of BUNCOMBE, before *Schenck, J.*

On 13 July, 1869, the plaintiff, as administrator of John Brigman, filed his petition in the probate court of Buncombe County, against the heirs at law of the intestate, for license to sell for assets certain lands which had descended to them. All the defendants except Kelsy Brigman, who was then a nonresident, accepted service of the summons, and it was duly returned to court. Of the defendants, six were infants of the respective ages of 20, 18, 16, 14, 12, and 10 years, and service for them was accepted by Joel Brigman, their guardian.

No answers were filed, and a decree was made authorizing and directing a sale, by virtue of which, among others, a certain tract was bought by one A. Bradley, who gave bond with the defendant (54) G. F. Penland as surety for the purchase money.

The debt was not paid, and both obligors having become insolvent, the plaintiff applied for and obtained an order to resell the land. The land was again sold on 6 March, 1876, and the said G. F. Penland became the purchaser at the price of $1,252, and for equal moieties thereof gave two notes with the other defendants as sureties, payable at six and twelve months from that date.

But one of these notes was paid, and after due notice, on 10 May, 1877, before the probate judge, motion was made for a summary judgment against the defendants on the remaining note. The defendants resisted the motion on the ground that the mode of proceeding was not authorized by law.

The objection was overruled, and judgment rendered for the plaintiff, which on appeal to the judge was affirmed, and thereupon execution issued for the debt.

On 27 August, following, the judge assigned to hold the Superior Courts of the district, on application of the defendants, directed notice to be given to the plaintiff to show cause before him why an injunction should not issue to prevent the enforcement of the execution, upon the ground that Kelsey Brigman and the infant heirs of the intestate, John Brigman, were not parties to the action, and not bound by the decree of sale, and meanwhile granted a restraining order, which was served with the notice on the plaintiff.

On the hearing of the motion for the injunction, affidavits were filed by the plaintiff, from which it appeared that the said Kelsey Brigman had also accepted service of a summons issued in the original action, which had been returned, but was not now to be found among the papers, and he at the same time waived all irregularities, and assented to becoming a party defendant.

The further hearing of the motion was postponed, and mean- (55) while, on the plaintiff's application, the probate judge caused notice to issue to the guardian, and to the other defendants, requiring them to show cause before him, on 11 September, why the sale heretofore made by the plaintiff should not be confirmed. The service of the notice was accepted by the parties, and the guardian filed an answer for the infants, consenting to the confirmation, and also obtained leave to file and did file an answer to the petition, as of the return day of the summons. When the hearing of the motion for the injunction was resumed, this further action of the probate court in the premises was brought to the attention of the judge, who held that the

alleged irregularities and defects had been remedied, denied the defendants' motion, and vacated the restraining order. From this judgment the defendants appealed.

J. H. Merrimon for plaintiff.
No counsel for defendants.

SMITH, C. J., after stating the case as above: We are of opinion that the injunction was properly refused.

The summary mode of proceeding adopted to enforce payment of the debt is authorized by law, under an express adjudication in this Court. Rev. Code, ch. 31, sec. 129; *Mauney v. Pemberton,* 75 N. C., 219.

The general guardian is the proper person on whom process against infant defendants should be served, and it is his duty to protect their interest in the suit. Bat. Rev., C. C. P., sec. 59.

If there were such irregularities in the preliminary proceedings as to impair the title to the land derived under the plaintiff's sale, they are corrected and cured by the subsequent action in the probate court. But were it otherwise, the obvious and appropriate remedy was open
(56) to the purchaser by process issuing from the probate court to call upon those who were not properly made parties to come in and confirm or repudiate the sale, and it was his duty to resort to this course before asking to have the contract annulled and himself freed from its obligation. Unless this remedy was unavailable, he was not entitled to relief by injunction. In this connection we desire to advert to a practice which has become quite common, and is entirely at variance with the provisions of The Code. We refer to the practice of seeking relief from a judgment by an injunction, addressed to the plaintiff, issued in a new independent action, and sometimes from a different jurisdiction.

As a provisional remedy, injunctions are granted in furtherance of a claim or right which the plaintiff asserts in an action. C. C. P., secs. 188, 196.

While the action is pending, relief can be obtained by a defendant aggrieved by a judgment by his applying to the court wherein it was rendered for a modification, and meanwhile for a supersedeas, or other order arresting proceeding, until the application can be heard. He is not allowed to seek redress from the action of one court through the conflicting and repugnant action of another court, or in a different and distinct proceeding in the same court.

Nor is it proper for one court, or the same court in another action, by a personal order directed to the plaintiff, to deprive him of those advantages and rights to which it has been adjudged he is entitled, while such judgment remains in force.

In our case the probate court was the appropriate and only place in which the defendant could obtain redress, and its power was ample for the purpose. The judge to whom application for the injunction was made was without jurisdiction in the premises, unless the matter came before him on appeal. The defendants' motion was prop- (57) erly refused. There is no error, and the judgment is

PER CURIAM. Affirmed.

Cited: Lord v. Beard, 79 N. C., 10; *Capel v. Peebles,* 80 N. C., 94; *Jones v. Cameron,* 81 N. C., 157; *Parker v. Bledsoe,* 87 N. C., 223; *Grant v. Moore,* 88 N. C., 78; *Long v. Jarrett,* 94 N. C., 446; *Coward v. Chastain,* 99 N. C., 445; *Smith v. Huffman,* 132 N. C., 603.

STATE ON RELATION OF ATTORNEY-GENERAL v. R. SIMONTON, EXECUTRIX, AND OTHERS.

Practice—Action to Vacate Charter of Corporation—Interpleader by Judgment Creditor—Private Corporation—Nonuser of Franchises—Estoppel.

1. Under C. C. P., secs. 65, 66, a court has power to allow a judgment creditor of a corporation to interplead to an action in the nature of a *quo warranto* brought by the Attorney-General to annul and vacate the charter of the corporation.
2. A bank which issues bills for circulation as money is a *public* corporation; but a bank which, beyond a power to contract in its corporate name, has no powers beyond those which every other person possesses, must be deemed a *private* corporation.
3. In an action to vacate the charter of a private corporation for the nonuser of its corporate franchise, when the nonuser complained of was an omission on the part of the corporators named in the act of incorporation to organize under it: *Held,* to be insufficient to warrant the relief demanded.
4. Where the corporators of a private corporation, without having created any shares of stock, or organized in any way, or paid into the corporate fund the capital which the law says shall be paid up, pretend to be incorporated and hold themselves out to the world as a corporation, they are estopped, as to those who deal with them on the faith of their representations, to deny the existence of the corporation.
5. The State is not interested in the right of an individual to an office in a private corporation.

QUO WARRANTO, tried at Fall Term, 1877, of IREDELL, before (58) *Cloud, J.*

This action was brought by the plaintiff, upon the representations of parties interested, under C. C. P., sec. 366, to annul the charter of the Bank of Statesville. The plaintiff moved for judgment on the complaint for want of an answer, and thereupon T. L. Patterson and others, being judgment creditors of the bank, asked leave to interplead, which was refused upon the ground that as a matter of law the motion could not be entertained.

The complaint alleged substantially upon information and belief:

1. That authority was given to certain corporators, by an act to charter the Bank of Statesville (Private Laws 1869-70, ch. 64), to open books of subscription, and when two hundred shares were taken and the money paid in, the stockholders so subscribing were authorized to meet and organize the corporation; but that no books of subscription were ever opened, nor organization had, by which the privileges conferred by said charter could accrue.

2. That R. F. Simonton, now deceased, without the knowledge and consent of the other corporators, caused to be written in a book procured by himself the form of a subscription of stock, and the names of the other corporators as subscribers for five shares each, the price of which was never paid by them; and that he advertised that said bank was organized, he being the cashier, and the other corporators directors, etc., and it is alleged that they held said offices and conducted the bank without authority of law.

3. That said Simonton made a last will and testament in which he devised and bequeathed all his estate to his wife, the defendant, and appointed her sole executrix, who has taken possession of all the assets of said bank, and continues to usurp the authority exercised by her testator. Demand for judgment that the charter be vacated, etc.

(59) Judgment for plaintiff. Appeal by defendants.

Shipp & Bailey for plaintiff.

Jones & Johnston, R. F. Armfield, M. L. McCorkle, and G. N. Folk for defendants.

RODMAN, J. This is an action in the nature of *quo warranto,* seeking to vacate and annul a charter creating a corporation to be called the Bank of Statesville. Some of the defendants disclaimed being stockholders or officers of the corporation. The others submitted to a judgment by default. Pending the proceedings, Patterson and others, claiming to be judgment creditors of the bank, applied to be allowed to interplead on behalf of their several interests. The judge refused to allow them to do so, on the ground that by law he had no authority.

We do not know what construction he put on sections 61 and 65 of C. C. P. It seems to us that these sections gave the judge ample power

to enable those persons claiming to be creditors to become parties. They claimed interests in the controversy adverse to the plaintiff, and even if a complete determination of the controversy could be had without their presence, justice required that it should not be made to their prejudice. On this ground we should remand the action to allow them to become parties, if on other grounds our opinion was not against the plaintiff, so that they have all that if parties they could have claimed in this action. The object of this action is to vacate and annul the charter granted to the Bank of Statesville by the act of Assembly of 1870, and several grounds are alleged in support of the demand for that judgment.

1. There is no doubt that the charter of a public corporation may be declared forfeited by a nonuser of its corporate franchises, for they are granted for the public good, and this is more espe- (60) cially true when they partake in any degree, as they generally do, of the nature of a monopoly. A bank which issues bills for circulation as money may be regarded as a public corporation; but a bank which, beyond a power to contract in its corporate name, has no powers beyond those which every other person possesses must be deemed a private corporation. And it may be considered doubtful whether merely by reason of an omission to use its franchise, which is given only for its private benefit, it can be held to have forfeited its charter—that is, the right to act again when its members shall think it for their interest to do so. If the charter be to run a mill of any sort, and for that purpose to act and contract as a corporation, no general public interest will be affected if, finding the business unprofitable, it should suspend its operations; and to do so would scarcely be considered a ground for the State to destroy its corporate existence. Field Corp., sec. 459, and cases cited.

However that may be, this at least seems clear in reason, that the nonuser complained of in the case of a corporation chartered only for the private gain of its members, and having no privileges beyond those of natural persons, and owing no chartered duties to the public, must not consist merely of an omission on the part of the corporators named in the act of incorporation to organize under it. If they have never organized under the charter, they have simply refused to accept it, and to become a corporation, and it can be of no moment to the State whether the act remains a dead letter or is formally repealed. In such a case the Assembly might clearly repeal the act, though it is doubtful if the court could annul it; for that would be simply to repeal an act of the Assembly. (61)

It is true that if the corporators named in the act, or any one of them, without having created any shares of stock, or organized in any way, or paid into the corporate fund the capital which the law says shall be paid up, pretend to be incorporated and hold themselves out to

the world as a corporation, they would be estopped, as to those who dealt with them on the faith of those representations, to deny them.

That is what is alleged in the complaint in this case: There were no books of subscription for stock opened; only five shares of stock were subscribed for, and that not *bona fide;* no capital was ever paid in, and no organization as a corporation was ever had. The charter was in fact not accepted by the corporators, and no corporation was ever formed. It may be that Simonton, who falsely represented the corporation as having an existence and that he was its cashier, and others, if any, who falsely held themselves out as directors, etc., were amenable to the criminal law for false pretenses. Certainly all who so held themselves out are estopped, as to those who dealt with the supposed corporation, to deny its existence.

The consequences of the dissolution of a corporation by a judicial declaration or otherwise may be assumed to be known. But what would be the effect of a judicial declaration that a corporation had never had an existence (which is what is demanded in this action) on the rights of those who dealt with it through its supposed officers it would be difficult to say. We were cited to no precedent of such judicial action. There were deposits received in the corporate name, thus creating debts apparently of the corporation. There were funds and other property held in the corporate name and as its property. If there never was a corporation, there can be no creditors of the corporation, and they can have no claim against the supposed corporate property, but only against those who falsely represented themselves as corporate officers.

(62) We are of opinion that there is no ground alleged on which we can declare the charter null or forfeited, or that the supposed corporation never existed. As to those who dealt with it, it did exist. It would be strange indeed if, after a bank has been held out to the world as a corporation for many years and, through persons calling themselves its officers, has had large and various dealings with the public, and has perhaps acquired large corporate property in money and lands, it should be competent or just for any court to declare that there never was such a corporation, and thus in some cases destroy or impair the rights of those who *bona fide* dealt with it, upon the ground that it does not appear to have been regularly organized or that its capital was paid up. These are matters about which the public can have no information other than from what appears on the face of things.

2. The other grounds alleged in the complaint may be briefly disposed of. It is said that Simonton during his life usurped the office of cashier of the bank. But he had died before the commencement of the action, and his supposed usurpation had ceased, and if others who are living usurp the same or other offices, it is difficult to see how the State can be

interested in the right of an individual to an office in a private corporation—as, for example, to the office of treasurer or bookkeeper of a railroad company, which for some purposes is a public corporation. This supposes that the corporation has or had an existence. But if it never did legally exist, as the complaint alleges, the State can have no interest to be asserted by this form of action in any pretenses to be its officers, however false. Besides, nobody claims any of these offices, and the defendants all disclaim them, and the corporation has ceased to act. Judgment reversed and

PER CURIAM. Action dismissed.

Cited: Bank v. Simonton, 86 N. C., 188; *Dobson v. Simonton, ib.,* 497; *Heath v. Morgan,* 117 N. C., 507.

---

(63)

JOSEPH DOBSON AND OTHERS v. ROXANNA SIMONTON, EXECUTRIX, AND OTHERS.

Practice—Creditor's Bill—Bank—Injunction—Receiver.

In an action wherein certain creditors of an alleged bank, which had never organized under the terms of its charter, but under the ownership and control of one S. had done business in its corporate name, were plaintiffs in a creditor's bill, and the executrix of S. and certain other creditors who after the death of S. had obtained judgments against the bank and were seeking to collect them, were defendants, in which action the plaintiffs demanded that the judgments in favor of the defendants be declared void, that the supposed assets of the bank be declared part of the estate of S., and that an account be taken, etc., and obtained an injunction in the court below restraining the defendant creditors from proceeding to collect their judgments and the defendant executrix from paying any of the debts of the bank or of her testator: it was *Held*, that the injunction should be continued until the hearing, a receiver of the bank assets appointed, and the issue of fact arising in the action submitted to a jury, unless by consent they should be submitted to a referee.

APPEAL from *Cloud, J.,* at Fall Term, 1877, of IREDELL.

The order of injunction heretofore granted in this action was continued by his Honor until the hearing, and the defendants appeal. The facts are set out by *Mr. Justice Rodman* in delivering the opinion of this Court. (See preceding case.)

Shipp & Bailey for plaintiff.

Jones & Johnston, A. W. Haywood, G. N. Folk, J. M. McCorkle, R. F. Armfield, and M. L. McCorkle for the different defendants.

RODMAN, J. The action is brought by the plaintiffs, claiming to be creditors of the Bank of Statesville, in behalf of themselves and all others, etc.

The complaint alleges that an act of Assembly of March,
(64) 1870, incorporated Simonton and others into a corporation by the name of the Bank of Statesville, and required them to open books of subscription to the stock of the corporation, and enacted that when a certain amount of capital stock, two hundred shares of $100 each, had been subscribed for, and paid in, the subcribers should elect officers, etc., and might contract in its corporate name. That although no books of subscription were opened, and no shares subscribed for, and no capital paid in, and no officers elected, yet Simonton, pretending that such corporation had been regularly and lawfully organized, and that he was cashier and Tate president thereof, entered into extensive dealings in the name of said supposed corporation, whereby he became indebted to the plaintiff and others, which debts are unpaid. In February, 1876, Simonton died, leaving the defendant Roxanna his executrix, and shortly afterwards it was discovered that the supposed bank was insolvent and had never had a corporate existence, and that all the supposed property and effects of the bank were in fact the property of Simonton; that in consequence of his false representations he was personally liable to the creditors of the supposed bank for all debts incurred in its name, and that his estate is insolvent.

The complaint further says that Patterson, and certain other defendants, being creditors of said bank, after the death of Simonton, sued the said bank and his executrix; that the summons was served on the executrix and one Sharpe, neither of whom were officers of the bank, and got judgment, and by execution and supplementary proceedings are endeavoring to collect the same from the assets of the bank.

It alleges that as the supposed bank never had a corporate existence, the judgments against it are nullities, and that the executrix of Simonton is wasting the assets of the supposed bank by paying the debts
(65) of her testator out of the due order of priority, and demand judgment:

1. That the judgments in favor of defendants be declared void.

2. That the supposed assets of the so-called bank may be declared a part of the estate of Simonton.

3. That the defendants Patterson and others, and all others having claims against the so-called bank, be enjoined from proceeding to collect the same.

4. That the executrix of Simonton be enjoined from paying any debts of the bank or of her testator, and that an account be taken of her receipts and dealings, etc.

On this complaint an injunction issued on 23 August, 1877.

It will suffice to make this decision intelligible to state very generally and briefly the answer of the defendant judgment creditors.

They say that the bank was organized substantially in compliance with the act of 1870; officers were duly elected, or at least permitted themselves to be held out to the world as having been; they acted in those capacities; the bank did business for several years under its corporate name; confiding in these representations, and believing it to be a legal and duly organized corporation, they dealt with it, and became its creditors; they have regularly obtained judgments for their respective debts; and have a lien on the assets of the bank, preferable to the individual creditors of Simonton, and to all other creditors of the bank who have obtained no liens. These are the issues made by the pleadings. Until the facts are finally proved, it would be premature to consider any questions of law which may arise upon them farther than is necessary to justify our present conclusion.

Assuming, for the occasion only, that the Bank of Statesville had a corporate existence as to those who *bona fide* dealt with it, it is clear that it has voluntarily dissolved. Nobody claims to own (66) its stock, and all its supposed officers disclaim their offices. It is a clear case, therefore, for the appointment of a receiver to take charge of and preserve its effects, subject to the order of the court.

To enable him to do this, the injunction must be continued until the hearing, when of course it will be subject to the order of the court. The issues of fact arising on the pleadings must be submitted to the jury, unless the parties shall agree to submit them to a referee. In that case the referee will report an account of all claims against the supposed bank, with the circumstances of each, as far as may be necessary to determine its prior right to payment over other claims, and also on such other matters as may be committed to him. The receiver will be required to report as to the effects which may come into his hands and his dealings with them.

This case is remanded to be proceeded in, etc. Neither party will recover costs in this Court.

PER CURIAM. Judgment accordingly.

Cited: Dobson v. Simonton, 86 N. C., 492.

(67)

H. BRUNHILD & BRO. v. J. H. & W. F. FREEMAN.

Practice—Judge's Charge.

Where on the trial below it appeared that the defendants had executed to one M. eight notes for $125 each, which M. had transferred to plaintiffs before due, as collateral, and that the defendants had executed to plaintiffs four new notes (upon which the action was brought), and that the old notes were thereupon delivered by the plaintiff to M., and the agreement under which the new notes were executed by defendants was in dispute: *Held*, to be error for the court to charge the jury, "that if the plaintiffs agreed to deliver to the defendants the eight old notes, and failed to do so, they could not recover," there being evidence (testified to on both sides) that after the plaintiffs gave the old notes to M. the defendant and M. made a new arrangement of their matters concerning the old notes, which by consent of all parties, including plaintiffs, were destroyed. The court, in its charge, should have given due force to these facts.

APPEAL from justice's court, tried at June Special Term, 1877, of NEW HANOVER, before *Seymour, J.*

The case was opened by the defendants, the evidence in whose behalf was, that in 1874 they executed and delivered to one Fiest Meyer twelve notes of $125 each for the rent of a house for three years, and payable at intervals of three months. The first four were paid, and afterwards, in 1875, one Nathan Meyer informed defendant J. H. F. that plaintiffs held the other eight notes as collateral security for goods sold to F. Meyer, and wished him to buy them. Nathan was a clerk of plaintiffs, and said defendant told him that the consideration for the notes had failed and he was not liable therefor, and declined to buy; but he afterwards saw one of the plaintiffs and gave him four notes of $100 each (upon one of which this action was brought) for said eight notes, when he was informed that Fiest Meyer held the plaintiffs' receipt for

(68) the eight notes, which would not be surrendered until the receipt was given up. Afterwards, the defendant and Meyer went to plaintiffs' office, the receipt was delivered to plaintiffs, who had the four new notes, and the eight old notes were delivered to Meyer under the protest of defendant, who demanded the eight old or the four new notes; but plaintiffs refused to give up either, stating that they would have to settle with Meyer. They then applied to Meyer for the eight notes he had bought of plaintiffs, and they refused to give them up, saying that he never authorized plaintiffs to sell $1,000 worth of paper for $400; but that he would agree to surrender to defendant as many of the notes as would be equal to the debt he owed plaintiff, viz., $415. They then went to the plaintiffs, and upon an arrangement entered into, by which defendant was to surrender the premises rented from Meyer, the eight old

notes were destroyed, three of them being surrendered and destroyed at once, and the other five (upon one of which a credit of $40 was entered) soon afterwards, in consideration of a bond to vacate the rented premises by a certain time, which was executed by defendant to Meyer.

The evidence in behalf of the plaintiffs was, that defendant J. H. F. came to them to buy the eight old notes, and plaintiffs, after consultation with counsel, informed him that they could surrender only so many of them as would satisfy their claim of $415 on Meyer; and according to their agreement the defendant, with Meyer, came to them, surrendered plaintiffs' receipt (as set forth in evidence of defendant), and thereupon the plaintiffs delivered three of the old notes, with $40, the balance due on Meyer's account, to the defendant, and by defendants' direction the other five were delivered to Meyer without objection, until some time afterwards, when the first note for $100 became due, and which the defendants failed to pay.

His Honor charged the jury, among other things, that plaintiffs were entitled to recover, unless the defendants had shown to their satisfaction that the contract was that the plaintiffs should de- (69) liver to defendants all the eight notes; and even though the contract was to deliver eight notes, if defendants accepted three notes and destroyed them, then there was a waiver of the original contract, and the plaintiffs would be entitled to recover; and if the plaintiffs agreed to deliver the eight notes for $125 each and failed to do so, the plaintiffs could not recover. Verdict for defendants. Judgment. Appeal by plaintiffs.

A. T. & J. London for plaintiffs.
D. L. Russell for defendants.

READE, J. The defendants had executed to one Meyer eight notes for $125 each, and Meyer had transferred them to the plaintiffs as collateral, to secure a debt for $415, before the notes were due. The defendants then executed to the plaintiffs four new notes of $100 each. And here the trouble begins.

The defendants allege that they gave to the plaintiffs the four new notes in full satisfaction of the eight old notes, and upon the agreement that the plaintiffs were to deliver up to them the eight old notes; and that instead of delivering them up to *them,* the plaintiffs delivered them back to Meyer, of whom they had got them.

The plaintiffs alleged that the new notes were not given in full satisfaction of the old, but in satisfaction of the plaintiffs' debt against Meyer, with the understanding that $400, the amount of the new notes, was to be entered as part satisfaction of the old notes, and that they gave the old notes back to Meyer.

(70) The jury find all the issues for the defendants, and unless his Honor erred in his charge, the verdict must stand.

His Honor charged the jury that if the plaintiffs agreed to deliver to the defendants the eight old notes, and failed to do so, they could not recover. Under that charge and the verdict, we are to assume that at the time the defendants gave the plaintiffs the four new notes it was upon the agreement that the plaintiffs were to deliver up to them the eight old notes, and that they did not do so, but delivered them back to Meyer.

In that view of the case, and if that were all, it would be such manifest injustice to make the defendants pay the new notes, while the old notes were outstanding against them, that we would certainly afford them some relief either in law or equity; but the charge allowed no force to the fact, which was testified to by the parties and witnesses on both sides, that after the plaintiffs gave the old notes back to Meyer the defendants and Meyer made a new arrangement of their matters concerning the old notes, and they went together to the plaintiffs, and all the old notes were destroyed by consent.

In failing to place this fact before the jury with proper instructions as to its effect, his Honor erred. And for this error there must be a

PER CURIAM. *Venire de novo.*

---

(71)

WILLIAM R. PEPPER v. CEBURN L. HARRIS AND A. W. CHAFFER.

Practice—Evidence—Judge's Charge—Verdict.

1. On the trial of an action, where it appeared that H., one of the defendants, had purchased the property for the value of which the action was brought, and the liability of S., the other defendant, was in issue: it was *Held*, that letters written by S. to a third person, concerning the property and alluding to it as "our stock," etc., were admissible in evidence.

2. Where on such trial the court charged, "that if the jury believe that S. in the course of his dealings and correspondence with the plaintiff gave him reasonable ground to believe and did believe that the property was to be bought and used for the benefit of S., and that the plaintiff parted with his property under that belief and the property was used for the joint benefit of S. and H., *on S.'s farm*, then S. is affected with liability to the plaintiff for the property as well as H.," etc.: it was *Held*, that it cannot be seen as a conclusion of law that the defendant S. was prejudiced by the use of the expression "S.'s farm," and that it was a matter exclusively within the discretion of the judge below, on a motion for a new trial.

3. The ungrammatical findings of a jury do not vitiate a verdict when the sense is clear; and where in this action the jury found that defendant H. agreed with the plaintiff to purchase the property and that the defendant S. was a party to the contract, there is no room for a misconstruction of the verdict.

APPEAL from *Buxton, J.*, at Spring Term, 1877, of WAKE.

This action was brought to recover the value of certain personal property (mules, cattle, hogs, etc.) belonging to the plaintiff, and which was located upon a farm on an island in the Roanoke River, in Northampton County, which farm had been owned by the plaintiff, but was under mortgage to one Zollicoffer. There was no dispute about the value of the property, and it was alleged that the defendants bought the (72) same at a sale in 1872, the defendant Harris conducting the negotiations upon the terms set forth in a written instrument signed by him, for the joint benefit of both defendants; whereas the defendant Shaffer claimed that it was for the sole benefit of his codefendant, who stipulated in said instrument for the payment of the purchase money. (See 73 N. C., 367, for report of same case.)

It was admitted that defendant Harris did purchase as alleged, and the question was, whether the defendant Shaffer was jointly liable upon said purchase. The jury found, in response to issues submitted, as follows:

1. Did defendants or either of them agree with plaintiff to purchase property mentioned in pleadings and to pay its reasonable value? Yes; by Harris.

2. Did they agree with plaintiff to purchase said property and pay therefor the value to be estimated by two disinterested persons, an umpire to be selected by them in case of disagreement? Yes; by Harris.

3. Did the reference selected by the parties ascertain the value of said property and make known the same to the parties? Yes.

4. If there was such agreement by defendants or either of them, was it upon condition to be first performed by plaintiff? Yes.

5. If upon such conditions precedent, have the conditions been performed by plaintiff or waived by defendants? Conditions were waived by defendants.

6. What amount, if any, is plaintiff entitled to recover? The amount of the appraised value, with interest.

7. Was defendant Shaffer a party to contract made between plaintiff and defendant Harris? Shaffer was a party to the contract.

8. Was any demand made before suit upon defendant Shaffer? Yes,

The evidence and exceptions to his Honor's charge are sufficiently set out in the opinion. Verdict and judgment for plaintiff. Appeal by defendant Shaffer. (73)

Moore & Gatling for plaintiff.
D. G. Fowle and A. W. Tourgee for defendant.

BYNUM, J. It was admitted on the trial that Harris purchased the property, for the value of which this action was instituted, and the sole question in issue was whether Shaffer was not jointly interested in the purchase, or had not otherwise made himself liable. The plaintiff and two defendants became witnesses in their own behalf; Pepper testifying that before the purchase by Harris, Shaffer, in making propositions to buy the land, also offered to purchase a portion of the personal property, and also giving evidence tending to show that Harris was the agent of Shaffer in conducting the negotiations; and Shaffer and Harris testifying and denying that Shaffer was concerned in the purchase. Before the sale to Harris, this codefendant had been negotiating with the plaintiff, the owner, and one Zollicoffer, the mortgagee, for the purchase of the Roanoke land on which the personal property bought by Harris was located. Harris purchased on 10 February, 1872. Prior to this purchase, to wit, 18 May, 1871, Shaffer wrote Zollicoffer, the mortgagee, proposing, with Pepper's consent, to relieve the mortgagee from all liability for the debts of Pepper, if the *personal* property and the land could be obtained by him. And after the sale to Harris, to wit, in October, 1873, Shaffer again wrote to Zollicoffer, stating his purpose to relinquish the possession of the land, for the purchase of which he had previously been negotiating, and upon which was the personal property purchased by Harris (and so far as we know, the only personalty used in the cultivation of the farm), and wishing to know of Zollicoffer, if "he wanted any of *our stock*, horses, mules, cattle, farming tools," etc., enumerating a long list of just the kind of
(74) stock and farming implements contained in the bill of particulars as sold by Pepper to Harris. The other letters, whether written before or after the sale, are more or less connected with the dealings with Harris in respect of the stock, or the land upon which it was located. These letters were, therefore, competent and important testimony going to establish the complicity of Shaffer in the purchase made by Harris. And they were also admissible, both as contradicting the testimony of Shaffer and as confirming the evidence of Pepper.

The next exception was to the charge of the judge to the jury. This was his language: "If the jury believe that Shaffer, in the course of his dealings and correspondence with the plaintiff, gave him reasonable ground to believe, and he did believe, that the personal property was to be bought and used for the benefit of Shaffer and that the plaintiff parted with his property under that belief, and the property was used for the joint benefit of Shaffer and Harris, on Shaffer's farm, then Shaffer

is affected with liability to the plaintiff for the property, as well as Harris; and this would be so, although the arrangement for the purchase was completed by Harris, in the presence of Harris alone." The exception is to the expression, "Shaffer's farm," used by the judge, as being calculated to mislead the jury. We cannot, as a conclusion of law, see how the defendant was prejudiced; therefore, the matter was addressed exclusively to the discretion of the judge below, on a motion for a new trial.

But the jury could not have been misled, for although the farm on the Roanoke was where the stock was at first located, it was in evidence that it was afterward removed to a farm near Raleigh, which was known as "Shaffer's farm," and there used in its cultivation.

The defendants finally submitted a motion in arrest of judgment, on the ground that the verdict was insensible. There were several issues submitted to the jury, but in order to present the point (75) made, it is necessary to set out only two of the issues and findings. The first was: "Did the defendants or either of them agree with the plaintiff to purchase the property mentioned in the pleadings, and to pay its reasonable value?" Answer: "Yes; by Harris." The seventh issue was: "Was the defendant Shaffer a party to the contract made between the plaintiff and the defendant Harris?" Answer: "The defendant Shaffer was a party to the contract."

The ungrammatical findings of the jury upon the first and other issues do not vitiate the verdict when the sense is clear, but when taken in connection with the finding upon the seventh and main issue, which is clear and explicit, there remains no room for misconstruction.

Upon the merits of the action, we refer to the two recent decisions of this Court, *Poole v. Lewis,* 75 N. C., 417; *Tull v. Trustees,* 75 N. C., 424.

PER CURIAM. No error.

(76)

D. D. SUTTLE v. J. M. GREEN.

Practice—Appeal from Justice's Court.

Where the defendant upon judgment being rendered against him in a justice's court appealed in open court, and afterwards told the justice not to send up the papers, who thereupon delayed so doing, and thereafter the defendant changed his mind and filed with the clerk of the Superior Court a bond sufficient to cover the plaintiff's claim and costs: *Held,* that it was not error in the court below to refuse to dismiss the appeal.

MOTION to dismiss an appeal from a justice at Fall Term, 1877, of CLEVELAND, before *Kerr, J.*

The statement embodied in the opinion of this Court delivered by *Mr. Justice Reade* is sufficient to an understanding of the point decided. His Honor refused the motion to dismiss, and the plaintiff appealed.

W. J. Montgomery for plaintiff.
J. F. Hoke for defendant.

READE, J. On the trial before the justice, the defendant denied that he owed the plaintiff anything. And when the justice gave judgment against him, he appealed in open court. This was all that he was obliged to do. It then became the duty of the justice, upon his fees being paid, to send the papers to the clerk of the court. As an excuse for not sending up the papers, the justice said that the defendant told him not to do it. Concede that this was a sufficient excuse for delay on the part of the justice, still it did not estop the defendant. He had *locus penitentiæ,* and he did change his mind and filed with the clerk a good bond to cover the plaintiff's claim and cost. And even when the defendant told the justice that he need not send up the appeal,
(77) it was not upon the idea of abandoning his defense, but, as he said, upon the idea that he could defeat the judgment by another way, the homestead; failing in which, he fell back upon his appeal.

We have already said that there was nothing in what the defendant did or said to estop him from prosecuting his appeal. And if there had been some slight irregularity, such as what he said to the justice and his tardiness in not having the justice to send up the papers before the term of the court, if indeed 8 October was after the commencement of the term, yet, as it was manifest from his denying the debt, appealing from the judgment, and giving a good bond, that he never intended to abandon his defense, it was very proper that his Honor should have refused to dismiss the appeal. And even if the defendant had lost his appeal by any technical fault, his Honor might well have had it brought up by *recordari.*

PER CURIAM. Affirmed.

Cited: Cowell v. Gregory, 130 N. C., 81, 83.

---

(78)

J. H. FAISON AND OTHERS v. WARREN JOHNSON.

Practice—Appeal from Justice's Court—Amendment of Pleadings.

Where in an action brought by appeal to the Superior Court from a justice's court the defendant alleged that his written answer filed in the justice's court was lost, and the court thereupon remanded the case to the justice,

with leave to perfect the pleadings: *Held*, to be error. In such cases the court had the power, and it was its duty, to perfect the pleadings and proceed with the trial.

APPEAL from an order made at Fall Term, 1877, of SAMPSON, by *Moore, J.*

The action in which the order was made was commenced before a justice of the peace to recover $100, and upon the suggestion of the defendant that the title to real estate was involved therein, the justice dismissed the case, and the plaintiff appealed to the Superior Court. When the case was called for trial the defendant stated that his answer filed in writing before the justice had been lost, and the plaintiff denied that such answer had been filed. Whereupon his Honor ordered that the case be remanded to the justice, with leave to perfect the pleadings, from which order the plaintiffs appealed.

J. L. Stewart and Battle & Mordecai for plaintiffs.
Kerr & Kerr for defendant.

FAIRCLOTH, J. The justice of the peace adjudged that he had not jurisdiction of the action, from which the plaintiffs appealed to the Superior Court. In that court the defendant alleged that his written answer filed in the lower court had been lost or destroyed, and thereupon his Honor remanded the case to the justice with permission to perfect the pleadings. This was error. His Honor had the (79) power, and it was his duty, under the liberal provisions of The Code, to perfect the pleadings and proceed with the trial. *Adams v. Reeves,* 76 N. C., 412, has no application. The present is a case of supplying lost papers and not of amending the record.

PER CURIAM. Reversed.

Cited: Moore v. Garner, 109 N. C., 158.

ANDREW BARRINGER v. JOHN A. ALLISON.

Justice's Court—Stay of Execution—Surety Thereto—Statute of Limitations.

1. One who signs a stay of execution upon a justice's judgment as surety becomes thereby a party to the judgment, and is bound to the same extent and in like manner as his principal.

2. In such cases the statutory bar of *seven* years (Rev. Code, ch. 65, sec. 6) applies to an action brought against the surety upon the judgment.

APPEAL from a justice of the peace, and tried at Fall Term, 1877, of IREDELL, before *Cloud, J.*

The facts are sufficiently stated by the *Chief Justice* in delivering the opinion of this Court. His Honor gave judgment for the plaintiff, and the defendants appealed.

Shipp & Bailey for plaintiff.
R. F. Armfield for defendant.

(80) SMITH, C. J. On 6 September, 1860, before a justice of the peace of Iredell County, the plaintiff recovered judgment against Thomas Allison and Edwin Fall, and at the same time execution was stayed by an entry, at the foot of the judgment, of the words "stayed by," which was signed by the defendant and attested by the justice.

The present action, to enforce the defendant's liability, was commenced before a justice in that county on 26 November, 1875, no part of the debt having been paid. The defenses relied on are the presumption of payment and the statute of limitations.

Since the time which elapsed between 1 September, 1861, and 1 January, 1870, is not to be counted, not quite seven years remain, a period insufficient to raise the presumption, or to bar an action founded on a judgment. *Johnson v. Winslow,* 63 N. C., 552; *Platt v. R. R.,* 65 N. C., 74; *Smith v. Rogers, ibid.,* 181.

The only question, therefore, presented in the record or argued before the Court is as to which of the provisions of the statute of limitations contained in the Revised Code is applicable to the facts of this case. If the defendant's liability rests upon *contract* only, the action to charge him must be brought within three years. If his liability, like that of the principal, arises out of the *judgment,* seven years are allowed within which it may be brought.

We are of opinion that the statutory bar of seven years applies, and that the suit was commenced in time.

The defendant's undertaking is not unlike that of a recognizance, except that it is unconditional, and no notice is necessary to
(81) make the obligation final. By signing the entry before the justice, he becomes a party to the judgment, and is bound to the same extent and in like manner as his principal. At the expiration of the time of stay, execution may issue against both, or against either the principal or the surety. This can be only upon the ground that there is a judgment against both, and that their liabilities are the same under the judgment. And if an execution may issue, which presupposes a judgment warranting it, we see no reason why any other statute than that applicable to a judgment should be invoked to bar an action to revive it.

While we have not met with any direct adjudication upon the point, we think it involved in the decision in the case of *Humphreys v. Buie,* 12 N. C., 378. In that case an action of debt before a justice was brought against one who had stayed the execution, to enforce his obligation. He insisted he was not liable in this form of action. In delivering the opinion of the Court, *Hall, J.,* says: "The first reason for arresting the judgment is, that debt will not lie upon the defendant's liability, as surety, for the stay of the execution. *Such suretyship is tantamount to a judgment,* because execution may issue upon it against the surety, and he is as much bound as the principal, and for that reason assumpsit will not lie against either."

We are but applying the principle thus announced to a new aspect of the case, when we declare that the plaintiff's action, based on the judgment, is not barred.

PER CURIAM. Affirmed.

---

(82)

LILLY & BROTHER v. ARCHIBALD PURCELL.

Justices of the Peace—Jurisdiction.

Laws 1876-77, ch. 287, ousting the jurisdiction of justices of the peace in civil actions where none of the defendants reside in the justice's county, does not apply to an action commenced before the passage of the act.

APPEAL from a justice of the peace, and tried at June Term, 1877, of NEW HANOVER, before *Seymour, J.*

Upon the trial before the justice, the defendant moved to dismiss the action for want of jurisdiction, because there was only one defendant, and he resided in a county other than that of the justice. This motion was overruled, and judgment given against the defendant for the amount of the note sued on, and the defendant appealed to the Superior Court, and his Honor affirmed the ruling of the justice. Judgment. Appeal by defendant.

Wright & Steadman for plaintiff.
McNeil & McNeil for defendant.

FAIRCLOTH, J. The plaintiff, a citizen of New Hanover County, brought this action before a justice of the peace in said county, against the defendant, a citizen of Robeson County, by sending process to the latter county, as provided by statute in certain cases. Did the justice have jurisdiction?

In *Wooten v. Maultsby,* 69 N. C., 462, it is said there was no such jurisdiction; but that was not the main question involved in that case, and it was probably not discussed. In *Sossamer v. Hinson,* 72
(83) N. C., it was held that the justice had jurisdiction under a proper construction of Bat. Rev., ch. 63, sec. 50; and so the law continued until Laws 1876-77, ch. 287, ratified 12 March, 1877, after the present action was commenced, which act in explicit terms takes away jurisdiction in a case like the present. Let judgment be entered here for the plaintiff according to the judgment below.

PER CURIAM. Affirmed.

Approved: Fertilizer Co. v. Marshburn, 122 N. C., 413; *Rutherford v. Ray,* 147 N. C., 257; *Austin v. Lewis,* 156 N. C., 463; *Dixon v. Haar,* 158 N. C., 343.

GIDEON PERRY ET ALS. v. AUGUSTUS SHEPHERD ET ALS.

Jurisdiction—Prohibition—Forcible Entry and Detainer.

1. The Superior Courts have no power to issue a writ of prohibition. The Supreme Court has the sole jurisdiction to issue such writ.
2. A justice of the peace has not jurisdiction of an action of forcible entry and detainer.

RODMAN, J., dissenting.

SMITH, C. J., having been of counsel, did not sit on the hearing of this case.

APPLICATION for a writ of *Prohibition,* heard at chambers in Raleigh, on 28 January, 1878, before *Cox, J.*

The plaintiffs alleged that the defendants had instituted an action of forcible entry and detainer before a justice of the peace against
(84) them, and were prosecuting the same in the justice's court without authority of law, and demanded that said justice be restrained and prohibited from proceeding further in said action, and that the same be transmitted to the Superior Court of Wake County.

The defendants demurred, and assigned as cause: (1) That plaintiffs could obtain complete and adequate redress for the alleged wrongs complained of in their complaint by a writ of *recordari* from the Superior Court, and without resorting to the extraordinary prerogative writ of prohibition; (2) That the complaint shows that the justice of the peace has jurisdiction to take cognizance of, hear, and determine proceedings for forcible entry and detainer.

His Honor adjudged that the demurrer be overruled, and the writ of prohibition issue as prayed for in the complaint. From which judg-

ment the defendants appealed. (See *Perry v. Tupper,* 74 N. C., 722; *s. c.,* 71 N. C., 380; *s. c.,* 70 N. C., 538.)

D. G. Fowle, Busbee & Busbee, A. M. Lewis, and G. H. Snow for plaintiffs.

E. G. Haywood and A. W. Tourgee for defendants.

READE, J. Our reports furnish but one instance of the use of the writ of prohibition in the State, which must be owing to the fact that we have other remedies more appropriate and equally efficacious. It cannot be said that a *new* case has arisen calling for this unusual remedy, because *forcible entry and detainer,* as this was, which is sought to be prohibited, has been common in our courts. The case alluded to in which it was resorted to is *S. v. Allen,* 24 N. C., 183, in which it was sought to prohibit the *de facto* commissioners for laying off the seat of justice of Henderson County from acting. It was held that it would not lie in *that case,* and the Court did not say that it (85) would lie in any case, but did say that if any court had the power, it ought to be exercised with caution, and never used except in a very clear case calling for an immediate remedy.

And the same rule obtains in England, where it is a common-law writ, framed to give the King's Bench jurisdiction to restrain all the inferior courts of the realm within their proper jurisdiction. And it was subsequently extended to the other courts at Westminster. "The Supreme Courts of Westminster having a superintendency of all inferior courts, may in all cases of innovation, etc., award a prohibition. In this, the power of the Court of King's Bench has never been doubted, being the superior common-law court in the kingdom." Bacon's Ab., title, *Prohibition,* A.

It will be observed that no inferior court in England had power to issue the writ. It was a high prerogative writ, and in the case of the *Company of Horners* in London, it is said that it is the *proper* power and honor of the Court of King's Bench to limit the jurisdiction of all other courts. Bacon's Ab., title, *Prohibition,* A, note (*a*), 2 Roll. R., 471. If, then, it be used in this State at all, what court ought to issue it? It would seem upon principle and by analogy that it ought to be the Supreme Court, and not an inferior court.

If there was any doubt before the adoption of our present Constitution, it would seem to be plain now. The jurisdiction of the Superior Court is defined in the Constitution and in the statutes. It is a court of original jurisdiction, to hear and determine cases indicated, and to try appeals from inferior courts. But there is no power, express or implied, to supervise and control inferior courts. But that power is expressly given to the Supreme Court.

"The Supreme Court shall have . . . power to issue any remedial writs necessary to give it a general supervision and control of the inferior courts." Art. IV, sec. 10.

(86) We are of the opinion that the Superior Court had no power to issue the writ of prohibition in this case.

It would not be necessary for us to go further, but it was desired by both sides that we should decide the other question, upon which indeed was the burden of the argument, whether a justice of the peace has jurisdiction of forcible entry and detainer.

It was properly conceded for the defendants that we must hold that a justice of the peace has not such jurisdiction, unless we overrule, as we were asked to do, three or four cases lately decided in this Court. We have reconsidered those cases in the light of the really learned arguments on both sides, and we feel obliged to adhere to them. It is a matter of practice involving not the right, but the remedy. It was much considered at the time of those decisions, and conceding that it was not free from doubt, and conceding, also, that in some respects it would be a convenient remedy, yet in other respects it would be mischievous, and so the better opinion was that the jurisdiction did not exist.

Suppose the question were still doubtful upon principle and upon authority other than those of our own, what ought we to do? Overrule them? If so, what security would there be that we may not revert to them at some subsequent term, and wreck all who may set sail under the last decision? A matter of right or of principle is eternal, and if by inadvertence we depart from it, we must return at the earliest opportunity; but as to the remedy or a matter of practice, although one way may be a little better than the other, yet the *most* important matter is to make the way *certain.*

It is from no want of appreciation of the argument with which we were favored that we do not enter into the discussion anew. *It is decided.* Let it stand until the Legislature may alter it. Laws 1874-75 has not that effect.

(87) It only makes the plea of title a more solemn act, by requiring an oath. *Perry v. Tupper,* 70 N. C., 538; *S. v. Yarborough,* 70 N. C., 250; *R. R. v. Sharpe, ibid.,* 509.

There is error. There will be judgment here that the proceedings for the writ of prohibition be dismissed, and that the defendants recover costs.

PER CURIAM. Proceedings dismissed.

Approved: S. v. Whitaker, 114 N. C., 819; *R. R. v. Newton,* 133 N. C., 138.

(88)

JOHN NETHERTON AND OTHERS v. W. G. CANDLER, ADMINISTRATOR, AND OTHERS.

Pleading—Demurrer—Amendment—Jurisdiction.

1. Where a complaint, in an action brought by legatees and devisees under the will of A. against the next of kin and heirs at law of A. (the executor of A. being dead and there being no administrator *d. b. n.* or administrator of the executor), alleged that A. died seized and possessed of a large number of tracts of land of large size (without otherwise describing them), located in four different counties and of great value, and possessed of large personal property and effects, all of which was directed to be sold by the executor; that the executor had fraudulently obtained releases from the plaintiffs of their interest in the estate (without describing the instruments of release or the interest of plaintiffs); that such of the lands as had not been sold by the executor had descended to the heirs at law, the defendants, who were therefore tenants in common with plaintiffs, and prayed for an account and settlement and partition: it was *Held*, that the complaint was demurrable.
2. In such case it was error in the court below to overrule a demurrer to the complaint and allow the plaintiffs to amend. The demurrer should have been sustained, and the plaintiffs required to pay costs, and then it was within the discretion of the court to allow the plaintiffs to amend the complaint.
3. In such case the action was properly brought to the Superior Court in term-time.

APPEAL from *Schenck, J.*, at Fall Term, 1877, of BUNCOMBE.

The facts sufficiently appear in the opinion delivered by *Mr. Justice Reade*. Defendants demurred to the complaint. Demurrer overruled. Appeal by defendants.

No counsel for plaintiffs.
J. H. Merrimon for defendants.

READE, J. The action is by the devisees and legatees of the late Zachariah Candler, deceased, for a settlement of the estate. George W. Candler was the executor of the will, and died intes- (89) tate, and no administrator *de bonis non* with the will annexed of Zachariah Candler had been appointed, and no administrator of George W. Candler had been appointed.

In this state of things the plaintiffs brought this action against the defendant's children and next of kin and heirs at law of George W. Candler, deceased.

The complaint alleges that Zachariah Candler died seized and possessed of a large number of tracts of land of large size, without otherwise describing them, located in four different counties, and of large

value; and possessed of large personal property and effects, all of which was directed to be sold by the executor; that a large portion was sold by the executor; that the executor had fraudulently obtained releases from the plaintiffs of their interest in the estate without describing the instruments of release or their interest; that such of the lands as had not been sold by the executor had descended to his heirs at law, the defendants, who were therefore tenants in common with plaintiffs; and praying for an account and settlement, and partition.

It will be observed how entirely inartificial and insufficient the complaint is. To dismiss it would be according to the course and practice of the courts, strictly speaking; but the parties are numerous, and it would be expensive and dilatory to begin again, and the defects may be cured by amendments, saving the defendants from all costs.

Upon coming in of the complaint, the defendants demurred: (1) for want of parties; (2) for multifariousness; (3) for want of jurisdiction; (4) that there was no administrator *de bonis non* with the will annexed of Zachariah Candler. His Honor overruled the demurrer, and allowed the plaintiffs to amend.

This was error. He should have sustained the demurrer, and required the plaintiffs to pay costs. And then instead of dismissing the
(90) case, he might in his discretion have allowed the plaintiffs to amend.

Upon sustaining the demurrer to a complaint, it is usual in this Court to dismiss the complaint; otherwise in demurrer to answer. But as his Honor allowed an amendment curing an important defect by making the administrator *de bonis non* with the will annexed of Zachariah Candler a party, and as the plaintiffs are entitled to an account, the case will be remanded, to the end that all proper amendments may be made in the discretion of his Honor, if they shall be moved for, and that such further proceedings may be had as the law allows.

We are of the opinion that the action was properly commenced in the Superior Court in term, as more is asked for than the probate court has jurisdiction of, as, for instance, the cancellation of the releases fraudulently obtained by the executor, in regard to the fund of which an account is sought.

The plaintiffs are cautioned that their complaint is in no frame for final relief. The defendants will recover costs in this Court.

PER CURIAM. Reversed.

Approved: *Hodge v. R. R.*, 108 N. C., 27; *Barnes v. Crawford*, 115 N. C., 80; *Woodcock v. Bostic*, 128 N. C., 246.

(91)

A. B. CURRIE v. D. M. KENNEDY.

Judgment—Satisfaction Thereof.

The acceptance by a judgment creditor of a promissory note upon a third person in satisfaction of the judgment is a discharge of the judgment, although the note is for a less amount than the judgment.

APPEAL from *Seymour, J.*, at Fall Term, 1877, of MOORE.

The plaintiff brought this action against K. B. Kelly, administrator of M. P. Morrison, and the defendant, demanding payment of a certain sum of money. The defendant answered the complaint, alleging satisfaction of the debt by compromise. The plaintiff demurred to the answer, and upon the hearing, his Honor overruled the demurrer and gave judgment for the defendant for costs, from which the plaintiff appealed.

The facts upon which the transaction was based are stated by *Mr. Justice Bynum* in delivering the opinion of this Court.

J. W. Hinsdale and J. Devereux, Jr., for plaintiff.
Neill McKay and Merrimon, Fuller & Ashe for defendant.

BYNUM, J. The case is before us upon the demurrer of the plaintiff to the answer of the defendant, from which the following facts appear: In February, 1870, the plaintiff recovered a judgment against one Kelly, as administrator of M. P. Morrison, and the defendant, as surety on the bond upon which the judgment was recovered. On 4 March, 1871, a compromise was entered into between the plaintiff and (92) Kelly, the said administrator, by which plaintiff agreed to and did receive, in satisfaction and discharge of his judgment for $636, a note on one Dowd for $406, dated 10 March, 1870, and payable six months after date, which note was a part of the assets of the estate of Kelly's intestate. This all occurred prior to Laws 1874-75, ch. 178, which therefore has no application to the case—at least we assume so, in the view we shall take of this action.

The question, then, which we are called upon to decide is, whether the acceptance by the judgment creditor of a promissory note, upon a third person in satisfaction of the judgment is not a discharge thereof, although the note so received is for a less amount than the judgment. That it is, has been expressly decided, both by the English and American courts. It was so held in *Sibree v. Tripp*, 15 M. and W., 22, where in delivering the opinion of the Court, *Alderson, B.*, said: "It is undoubtedly true that payment of a portion of a liquidated demand in the *same manner* as the whole liquidated demand ought to be paid is *payment*

only in part; it is not one bargain, but two, namely, payment of part, and an agreement without consideration to give up the residue. The courts might very well have held the contrary, and have left the matter to the agreement of the parties; but undoubtedly the law is so settled. But if you substitute for a sum of money a piece of paper, or a stick of sealing wax, it is different, and the bargain may be carried out in its full integrity. A man may give in satisfaction of a debt of $100 a horse of the value of five pounds, but not five pounds. . . . Let us then apply these principles to the present case. If for money you give a negotiable security, you pay it in a different way. The security may be more or less; it is of uncertain value. That is a case falling within the rule I have referred to."

The illustrations put by *Baron Alderson* show the absurdity of the distinctions made by the solemn decisions of the courts, that a
(93) money demand of $100 may be discharged by a stick of sealing wax of the value of sixpence, but not by $50, although received in satisfaction of the demand. The Court, therefore, in that case very justly questions the good sense of such technical distinctions, and says "the courts might well have held the contrary, and left the matter to the agreement of the parties." See *Evans v. Raper,* 74 N. C., 639. *Sibree v. Tripp* has been approved and followed by the American cases. *Cumber v. Wane,* 1 Smith L. C., 142, American notes, where the question is fully discussed, and the decisions in this country sustaining it are cited. The principle, though in a case not precisely like the present, has been declared by this Court in *Gordon v. Price,* 32 N. C., 385.

PER CURIAM. Affirmed.

Cited: Koonce v. Russell, 103 N. C., 181; *Bank v. Commissioners,* 116 N. C., 362.

NOTE.—BYNUM, J. Since filing the above opinion, our attention has been called to the fact that by the terms of the compromise the defendants were to pay the costs then accrued, and that we have not rendered judgment therefor in this Court. It will be seen in the record that when execution was moved for before the clerk, while he refused to issue execution for the alleged balance of the judgment, he gave the plaintiff leave to issue the costs, which he declined to do. That judgment has been affirmed here. The plaintiff, then, can issue in the court below for the costs pursuant to the terms of the compromise. There was no point about this made in the argument here, and if there had been it could not have changed our judgment.

(94)

HENRY COBB AND W. G. COBB, ADMINISTRATORS OF JOHN COBB, v. MARY GRAY AND OTHERS.

Legislative Scale for Confederate Money—Note in Substitution of Prior Note.

A note executed in 1863, for the balance due upon a note executed in 1853 (such new note being given because of the lack of space on the old note for the entry of the credit), is not subject to the legislative scale for Confederate money.

APPEAL from a justice's court, tried on appeal at Fall Term, 1877, of ALAMANCE, before *Buxton, J.*

A jury trial being waived, his Honor found the facts as follows: In 1853, Mary, Margaret, and Phœbe Gray gave their note to the plaintiff's intestate and made several payments which were credited thereon, and in January, 1863, they went to him to make another payment for $200, but there being no space on which to enter the credit, a new note under seal was executed for the balance due, less the $200 payment, and signed by said Mary and Margaret (and the husband of said Phœbe, who was then married) and made payable to plaintiff's intestate, who received it in substitution of the old note, which was surrendered to the makers. The new note is now in suit. In August, 1866, the defendants paid to plaintiff's intestate more than was due on said note if it was subject to scale of January, 1863, but less than was due if it was not subject to be scaled. The court held that although the note was dated in January, 1863, and payable one day after date, yet it was not payable in Confederate money, nor subject to the legislative scale upon the facts found, and gave judgment for the plaintiff, from which the defendants appealed.

J. A. Gilmer for plaintiff. (95)
J. A. Boyd for defendants.

FAIRCLOTH, J., after stating the case as above: We agree with his Honor in holding that said note is not liable to the scale. *Cable v. Hardin,* 67 N. C., 472, is not in point. There it was held from the manifest intent of the parties that the transaction was a new loan, and the scale applied. Here the debtors did not propose or intend to pay the whole debt, but only a part of it; and the new note was not made for the benefit of the creditor, nor upon any idea of a loan of that amount of money, but because there was not room on the old note to enter the credit. Novation is not to be presumed unless the intention to novate clearly results from the act of the parties. The intention to do so does not appear in this case, but it appears to the contrary; and the transaction

in August, 1866, between the same parties shows that they did not intend or understand that the scale was applicable. The overpayment is not alleged to have been made by mistake, etc.

King v. R. R., 91 U. S., 1, does not apply, for the reason that the contract was that payment should be made in Confederate currency.

PER CURIAM. Affirmed.

---

(96)

V. MAUNEY, ADMINISTRATOR, v. STOKES INGRAM.

Claim and Delivery—Bailee—Practice—Demurrer to Answer—Counterclaim.

1. A bailee of a horse has no lien upon the animal for expenses incurred in feeding and taking care of it.
2. In an action of claim and delivery for a horse, where the answer alleges a lien upon it, a demurrer to the answer does not admit the lien. It merely admits the facts set out in the answer, denying their sufficiency in law.
3. Where in such case the owner is dead and the action is brought by his personal representative, a debt due defendant for feeding and taking care of the horse cannot be set up as a counterclaim.

APPEAL from *Buxton, J.*, at Spring Term, 1876, of MONTGOMERY.

The plaintiff brought this action to recover possession of a gray mare belonging to his intestate, under the provisions of C. C. P., "Claim and Delivery of Personal Property." The defendant on demand of the plaintiff refused to deliver the mare, and in his answer, which admits the plaintiff's property, sets up a claim for compensation for feeding and taking care of her for three years at the price of $75 per year, and insists upon the right to retain her until his charges are paid. The plaintiff demurs to the answer, and specifies as the ground of his objection that in law no such lien exists upon the statement of facts contained in the answer. The court overruled the demurrer, and allowed replication, and from this judgment the plaintiff appealed.

L. S. Overman and W. G. Burkhead for plaintiff.
Neill McKay and J. W. Hinsdale for defendant.

(97) SMITH, C. J., after stating the facts as above: The question thus presented for our determination is as to the validity of the alleged lien for the defendant's charges, and his right to retain possession until they are paid.

We are of opinion that the defendant has no such lien, and his withholding the property is a tort which entitles the plaintiff to the redress he seeks. The doctrine of liens on personal property is very clearly stated by Mr. Adams: "A lien is a right to retain a personal chattel until a debt due the person retaining is satisfied, and it exists at common law, independently of liens by agreement or usage, in three cases: (1) Where the person claiming the lien has by his labor or expense improved or altered the chattel. (2) Where he is bound by law to receive the chattel or to perform the service in respect of which the lien in claimed. (3) Where the claim is for salvage."

"The general rule," says *Parke, Baron,* as laid down by *Best, Chief Justice,* in *Bevan v. Waters,* and by this Court in *Scarfe v. Morgan,* is, "that by the general law, in the absence of any special agreement, whenever a party has expended labor and skill in the improvement of a chattel bailed to him, he has a lien upon it." *Jackson v. Cummings,* 5 M. and W., 348.

And it is held that while an innkeeper, like a common carrier, by reason of his public employment and the stringent obligations it imposes, has a lien upon the goods of his guest for board, a livery-stable keeper has none upon the horse which he feeds. The authorities cited by plaintiff's counsel fully settle this. 2 Kent Com., 634; 3 Parsons on Contracts, 338, 342, 350; Oliphant on Horses, 139; *York v. Greenaugh,* 2 Lord Raymond, 868.

In a full and elaborate discussion of the subject in the Supreme Court of New York, *Bronson, J.,* delivering the opinion, says: "The right of lien has always been admitted when the party was bound to receive the goods, and in modern times the right has been (98) extended so far that it may now be laid down as a general rule, that any bailee for hire who by his labor and skill has imparted an additional value to the goods has a lien upon the property for his reasonable charges. This includes all such mechanics, tradesmen, and laborers as receive property for the purpose of repairing or otherwise improving its condition. But the rule *does not extend to a livery-stable keeper,* for the reason that he only keeps the horse, without imparting any new value to the animal. And, besides, he does not come within the policy of the law which gives the lien for the benefit of trade." *Grinnell v. Cook,* 3 Hill, 491.

Assuming that the defendant stands in the relation of bailee to the intestate (a fact not distinctly averred in the answer), he is certainly no more entitled than a livery-stable keeper to retain possession of a horse until his charges for keeping and feeding are paid. In neither case does the law recognize a lien.

But the defendant's counsel insists that the demurrer admits the lien, and that the only way to raise the question of its validity is to deny it by replication. This is a misconception of the office and effect of a demurrer. The demurrer admits the facts set out in the pleading and denies their sufficiency as a defense. Thus an issue of law arises to be decided by the court, and it is, whether upon the defendant's own statements a lien exists in his favor upon the mare which warrants his refusal to surrender possession to the plaintiff. This question has already been disposed of.

The defendant also sets up a counterclaim, and says he has a right to have the mare sold and his debt paid out of the proceeds of sale. This position is equally untenable. The plaintiff, as owner of the property and deriving his title from the intestate through the
(99) letters of administration, seeks in this action to recover the mare as part of his intestate's estate, in order that it may be applied in a due course of administration according to law. His cause of action accrues from the defendant's wrongful conduct since the intestate's death, and a counterclaim for a debt due from the intestate cannot be interposed to prevent the specific property, or its value in case of loss or destruction, from passing into the hands of the plaintiff as part of a trust fund to be disposed of as required by law. *Kesler v. Roseman,* 44 N. C., 389. No creditor can be permitted by his own tortious act to obstruct or interfere with the proper and legal administration of the property of his debtor after his death, and thus under the form of a counterclaim secure an unlawful priority to himself. If the defendant had a lien, the plaintiff could not recover possession of the mare without paying it, or the defendant's demand might be paid out of the proceeds of a sale. But in the absence of a lien, no counterclaim having such effect can be set up within the true meaning of C. C. P., sec. 101. The action being in tort for withholding property to which the plaintiff is entitled, it is difficult to see how a mere money demand like this can be said to arise out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or be so connected with the subject of the action as to constitute the counterclaim defined in The Code. The current of judicial opinion in the States which have adopted codes that contain a similar provision, and the views of Mr. Pomeroy in his work on Remedies and Remedial Rights, seem to be unfavorable to such defense. But as it is not necessary to a determination of the cause, and the point is not wholly free from doubt, we express no decided opinion in regard to it.

The judgment below must therefore be reversed and the demurrer sustained. We cannot proceed to give final judgment here, for the

reason that the plaintiff demands damages for the detention, (100) and unless the parties agree upon their amount, a jury may be required to assess them. The record shows that the mare has been sold, and the fund left in the plaintiff's hands to await the result of the suit, and the proper orders in relation thereto must be made in the court below.

PER CURIAM. Reversed.

Cited: Rountree v. Britt, 94 N. C., 110; *Pate v. Oliver,* 104 N. C., 465; *Davis v. Manufacturing Co.,* 114 N. C., 329.

JOHN C. GAY v. R. S. NASH.

Crop Lien—Registration.

A crop lien to secure agricultural advances (executed under Bat. Rev., ch. 65, secs. 19, 20) is valid *inter partes,* although not registered within thirty days, as required by the statute.

PROCEEDING to enforce a lien for advances for agricultural purposes, commenced by affidavit before the clerk and heard upon issue joined at Fall Term, 1877, of RICHMOND, before *Seymour, J.*

Upon the trial it appeared that the parties had entered into a written contract in which the plaintiff, merchant, agreed to furnish supplies to the amount of $700 to the defendant, planter, to enable him to cultivate a crop, in consideration of which the defendant agreed to deliver to the plaintiff so much of the cotton, etc., as might be sufficient to pay said sum. The contract was executed 14 January, 1876, admitted to probate 14 February, and registered 17 February thereafter. (101) And his Honor dismissed the proceeding upon the ground that the contract was not registered within thirty days. Judgment in favor of defendant for costs. Appeal by plaintiff.

T. P. Devereux and J. W. Hinsdale for plaintiff.
T. S. Ashe and Battle & Mordecai for defendant.

READE, J. The statute provides that a written lien upon a crop, for advances of means to make the crop, shall have preference of other liens, etc.; and such written liens are required to be registered within thirty days. Bat. Rev., ch. 65, secs. 19, 20. In this case the written lien was not registered within thirty days. That fact would certainly

make it void as to third persons; but the question here is, whether it is good as between the parties.

We are of the opinion that it is good *inter partes.*

The object of registration is to give notice. The parties have notice without registration.

PER CURIAM. Reversed.

Cited: S. c., 84 N. C., 334; *Reese v. Cole,* 93 N. C., 90; *Butts v. Screws,* 95 N. C., 218; *Nichols v. Speller,* 120 N. C., 79.

(102)

MARY A. MILLER v. JOHN C. MILLER.

Divorce from Bed and Board—Construction of Statute—Indignity Offered by Husband.

1. To entitle a wife to a divorce from bed and board under Bat. Rev., ch. 37. sec. 5 (4), the indignity offered by the husband must be *such as may be expected seriously to annoy a woman of ordinary good sense and temper,* and *must be repeated,* or continued in, so that it may appear to have been done *willfully* and *intentionally* or at least *consciously* by the husband to the annoyance of the wife.
2. In an action by the wife for divorce from bed and board, where it appeared that the husband at various times in the absence of the plaintiff had had carnal intercourse with a female servant in his bedchamber, from which she became pregnant: it was *Held,* that the plaintiff was not entitled to the relief demanded.

READE, J., dissenting.

ACTION for divorce *a mensa et thoro,* tried at Fall Term, 1877, of ROWAN, before *Cox, J.*

The plaintiff alleged, among other things, that she suspected the defendant of improper intimacy with one Louisa Nash, who was introduced by the plaintiff as a witness, and testified (as stated in the case) that she lived as a servant in the family of plaintiff and defendant, and that during the absence of the plaintiff from home she had carnal intercourse more than once with the defendant in his bedchamber, and that she became pregnant by defendant. During her pregnancy the plaintiff asked her what was the matter with her, and she replied that she was pregnant by defendant; and as soon as the plaintiff heard this statement she proceeded to leave defendant's house. On cross-examination of this witness, the defendant proposed to prove by her that as soon as the plaintiff heard that witness was pregnant by defendant, and

when plaintiff was preparing to leave, he begged her not to leave, and promised if she would remain with him he would never be guilty of any other infidelity towards her, and that the plaintiff left (103) immediately thereafter, to which the plaintiff objected, which objection was overruled by his Honor, and the witness testified as above stated; and that plaintiff did leave, notwithstanding the entreaties and promises of reformation by defendant. Witness further testified that she thereafter left defendant's house, but returned several months since and lived in an outhouse of defendant about 100 yards from defendant's dwelling-house, and that after the separation of plaintiff and defendant she had never on any occasion had carnal connection with the defendant. Leah Quillman, a witness for the plaintiff, testified that the defendant only permitted said Louisa to return to his premises after applying in vain to her (witness) to give her shelter, when she advised defendant to take her himself, which he consented to do, remarking at the time that he must provide for his child. There was no evidence that when plaintiff separated from defendant she knew or was informed that criminal intercourse as aforesaid had occurred in the bedchamber of the parties when they lived together. The plaintiff has ceased to live with her husband or on his premises ever since she heard of said adultery.

The plaintiff asked the court to instruct the jury that the conduct of the defendant in having frequent connection with said Louisa in the private bedchamber, and his subsequent conduct in bringing said Louisa to live on the premises, were such indignities offered to plaintiff as to render her condition intolerable and life burdensome. This his Honor declined, but charged the jury that it was for them to say from all the evidence whether the defendant had offered such indignities to the plaintiff as to render her condition intolerable and life burdensome. Plaintiff excepted.

Issues raised by the pleadings were then submitted to the jury, who found: (1) that the parties were husband and wife, and lived in this State three years immediately preceding the commencement (104) of this action; (2) that defendant did commit adultery with Louisa Nash at the house of plaintiff and defendant; (3) that defendant did not treat plaintiff with such cruelty and indignity as to compel her to separate from him and to leave his bed and board; (4) that defendant did not live in adultery with said Louisa after said separation; and (5) that defendant did not offer such indignities to the person of the plaintiff as to render her condition intolerable and life burdensome. Judgment for defendant. Appeal by plaintiff. (See *Morris v. Morris*, 75 N. C., 168, and *Long v. Long*, 77 N. C., 304.)

W. H. Bailey for plaintiff.
J. M. McCorkle for defendant.

(105) RODMAN, J. By the law of this State, a divorce from the bonds of matrimony shall be granted to a wife when her husband separates from her and lives in adultery. Bat. Rev., ch. 37, sec. 41. This act has been on our statute-book for many years. The statutes of perhaps most of our sister States are different. 1 Bish. Mar. and Div., secs. 703-707. We have no occasion to defend the policy of our legislation, but we may express the belief that infidelity on the part of husband is not more frequent here than elsewhere. It is agreeable also to find that the most recent legislation in England, the result of its most mature consideration and experience on this subject, is in principle the same with our own. The English statute may be found in 1 Bish. Mar. and Div., sec. 85, note.

Our act of Assembly further says:

"SEC. 5. The Superior Courts may grant divorces from bed and board on the application of the party injured . . . in the following cases: (1) If either shall abandon his or her family, or (2) shall maliciously turn the other out of doors, or (3) shall by cruel or barbarous treatment endanger the life of the other, or (4) shall offer such indignities to the person of the other as to render his or her condition intolerable and life burdensome, or (5) shall become an habitual drunkard."

The plaintiff does not claim a divorce *a vinculo;* but it is contended for her that the conduct of the defendant has been such as to bring him within the fourth of the above grounds for a divorce from bed and board; and that the adultery of the defendant under the circumstances attending it was such an indignity to her person as did in contemplation of law render her condition intolerable, etc. It has not been contended here that the indignity intended by the act must necessarily be one to a wife's body. It is conceded that there may be offenses to the mental and moral sensibilities of a wife of such a character and under such circumstances that, if continued, they will amount to cruelty, (106) which, in the sense in which the word is used in the law of England and generally in that of the United States, is the equivalent expression for what is called in our statute "such indignities as render her condition intolerable," etc. 2 Wait Actions and Def., 560, 561. An instance of such an offense would be the keeping of an abandoned woman in the house in which the husband and wife resided, and thus forcing the wife either to abandon her home or to submit to an association repugnant to her affections, her virtue, and her self-respect. Such conduct as this might also come under the second clause. Other examples less strong, but sufficient without violence to the person to constitute manifest cruelty, may be supposed. One of such is found in the recent English case of *Kelly v. Kelly,* 2 Prob. and Div., 59; 1 Bish. Mar. and Div., sec. 783. Another might be found in *Everton v. Everton,*

50 N. C., 202. In this case, however, although decided as late as 1857, it was held that the diversion of the husband in shooting one negro woman, the property of the wife, and whipping sundry others of his own, in close proximity to the chamber in which his wife was lying sick in bed, was not cruelty. This case is very far behind all the modern decisions on this subject, and would scarcely be decided in the same way at the present day.

It would be impossible, and we shall not undertake, to decide with any precision the course of conduct which will amount to legal cruelty, or to "indignities, etc.," within the meaning of the act. But it may confidently be said that the indignity, whatever may be its form or nature, must be *such as may be expected seriously to annoy a woman of ordinary good sense and temper*. If from bad health the wife is morbidly nervous or sensitive, that must be allowed for. But as nothing of that sort is alleged in this case, such a supposition may be omitted from our consideration. Generally speaking, the conduct of the husband must be such as might reasonably be expected to annoy a woman of an ordinarily sound and healthy nature. *It must be repeated* (107) or continued in, so that it may appear to have been done *willfully and intentionally,* or at least *consciously* by the husband, to the annoyance of the wife. He must have reason to believe that his act or course of conduct will greatly and naturally annoy his wife, and must persist in it regardless of such annoyance.

We think the above rule is as favorable to the plaintiff as she can reasonably be thought entitled to. It is perhaps more so than is quite consistent with the authorities. If *Everton v. Everton* is entitled to any weight at all, it establishes a rule much harsher than this; and the cases of *Butler v. Butler,* Parsons Eq. Cases, 329, and *Kelly v. Kelly,* 2 Prob. and Div., 59, which are the most modern cases on this subject, and the most favorable to the plaintiff of any which I have found, say that the annoyance to the feelings of the wife must, either from its character or its persistency, endanger her life or health. See 2 Wait A. and D., 564; *Powelson v. Powelson,* 22 Cal., 358; *Gholston v. Gholston,* 31 Ga., 625. Tested by this rule, the case of the plaintiff of course fails; for it is not alleged that her feelings have been shocked to the degree of endangering her life or health.

The question then is, Can the plaintiff's case be brought within the very favorable rule which we have supposed to be applicable to such cases? The acts of adultery by the husband were repeated at intervals during a period of less than nine months, and resulted in the pregnancy of the female servant; but they were all committed during the absence of the wife from her home, and never came to her knowledge until, seeing the condition of the servant, she inquired into the cause of it, and upon

being informed, she immediately left the husband's house, and has never since returned to it.

(108) In estimating the alleged indignity, I dismiss from consideration that it was committed in the bedroom in which the husband and wife slept when she was at home, as being a mere poetic and fanciful, and not a real, aggravation. Whatever weight might be assigned to it, it was unknown to the plaintiff until after this action was brought. After the offense of the husband became known to the wife, it was never repeated, and the husband entreated forgiveness and promised future fidelity. It is evident that the case does not come within the principles which we have supposed should apply. The conduct of the husband, though immoral and blamable, was only such as many a sensible and good-tempered wife has thought it wise, and dutiful, and according to the impulses of her heart, to be blind to, or generously to forgive. The husband's conduct was not *consciously or willfully* to the annoyance of the wife. His acts were not intended or expected to annoy her, for he never expected her to know of them. The indignity to her feelings was not willful on his part, but accidental, resulting from her inquiries, which were not anticipated by him.

We cannot think the defendant's conduct, however reprehensible, was such "indignities" as was intended to be covered by the statute, or was calculated to render the condition of any reasonable woman "intolerable or her life burdensome." This is not a case in which the law ought to interfere to sanction, and perhaps perpetuate, the separation of a married pair who may again unite without impropriety, and without the loss of self-respect on the part of either, and, taught by experience, may live henceforth happily together. An English poet once gave advice to husbands, which Lord Chatham made immortal, even if its own good sense had not otherwise have served to make it so, by quoting it in one of his great speeches on the policy of Britain towards America. The advice will equally teach wives how to manage their husbands:

(109)

"Be to his faults a little blind,
Be to his virtues very kind,
And clap your padlock on his mind."

PER CURIAM. Action dismissed.

Cited: Page v. Page, 161 N. C., 175.

JOHN LONDON AND WIFE v. THE CITY OF WILMINGTON.

Taxation—Uniformity—Practice—Action by Taxpayer—Injunction.

1. A tax levied by a municipal corporation of 2 per cent on real estate, excluding from valuation and taxation the stocks of goods owned by merchants, is obnoxious to Art. VII, sec. 9, of the Constitution, as not being *uniform;* and the fact that the corporation added to the tax on the *monthly sales* of said merchants more than enough to compensate for the deficiency caused by said exclusion does not alter the case.
2. An action for an injunction lies at the instance of a taxpayer, suing either alone or on behalf of all others similarly situated, to enjoin the collection of an illegal tax by a municipal corporation.
3. But before such action can be maintained, it must appear that the plaintiff has paid so much of the tax, if any, as is admitted to be due.
4. Mandamus to require uniform assessment suggested.

APPLICATION for an injunction to restrain the defendant from collecting certain taxes, heard at June Special Term, 1877, of NEW HANOVER, before *Seymour, J.*

The plaintiffs alleged that the defendant (board of aldermen) by virtue of an ordinance passed on 18 January, 1875, levied a tax of 2 per cent upon all the real estate in Wilmington for 1875, and that by Constitution, Art. VII, sec. 9, all taxes levied by any (110) town or city are required to be uniform upon all property in the same, not exempted by the Constitution; that the defendant exempted from taxation for said year the stocks of goods of all the merchants in said city which were on hand on 1 April, 1875, by means whereof the amount of the assessed value of the personal property was reduced by at least the sum of $700,000, and that said exemption imposed the burden of taxation upon the real estate and personal property (other than the stocks of goods aforesaid) to the amount of the tax properly derivable from said stocks of goods, and that said discrimination in favor of said merchants is in violation of said constitutional provision, and renders the whole tax list void; that the real estate of plaintiffs, valued at $3,667, is included in said tax list which has been delivered to the city tax collector, who has advertised that unless the taxpayers of said city shall pay their taxes he will sell their property for the same, whereby a cloud would be put upon the title of the plaintiffs to the said real estate; and that plaintiffs have commenced a civil action, etc., and therefore demand judgment that the defendant be perpetually enjoined from collecting the tax levied as aforesaid, etc.

The defendant, after admitting that said merchants were not required to list their stocks of goods in 1875, as alleged in the complaint, and

averring that in lieu thereof they were required to pay a monthly license tax, based upon the monthly sales, for carrying on their business, which license tax was uniform and *ad valorem,* denied that any extra burden of taxation was thrown on the real estate or personal property as alleged by plaintiffs; but, on the contrary, averred that the revenue derived from the license taxes was greater than if the stocks of goods on hand on 1 April, 1875, had been taxed 2 per cent upon the value thereof, which was not exceeding the sum of $500,000. The de-
(111) fendant further alleged that the revenue of the city for said year was insufficient to pay the current expenses for the same and the interest on its bonded debt, and that plaintiffs were included among the list of delinquent taxpayers of said year.

The plaintiffs, replying, alleged upon information and belief that since 1868, with the exception of 1875, the merchants of said city have annually listed and paid taxes on stocks of goods as other property was taxed, in addition to the monthly license tax for the privilege of carrying on business, and that said stocks were listed before the township trustees for 1875, according to their value in money.

Upon the hearing, his Honor gave judgment for the plaintiffs, and the defendant appealed.

E. S. Martin and A. T. London for plaintiffs.
D. L. Russell for defendant.

RODMAN, J. Since *Brodnax v. Groom,* 64 N. C., 244, and *Galloway v. Jenkins,* 63 N. C., 147, it must be considered settled in this State that a taxpayer may institute an action, either alone or on behalf of all others similarly situated, to enjoin the collection of an illegal tax, at least by a county or city. This must necessarily be so, if (as was held in *Huggins v. Hinson,* 61 N. C., 126, when taxes are collected under a tax list) the payer cannot recover them back from the sheriff, although he paid under protest; otherwise, there would be no redress against any illegal taxation on property, and no redress could be given for even a clear violation of right. As we said in *Brodnax v. Groom,* to maintain such an action it will not suffice that the illegality is trifling, or is in some collateral matter, or by some mistake, or is a mere irregularity; it must be material and go to the very substance and root of the
(112) tax. Although it is fit and proper that the courts should have power to restrain illegal taxation, at least by the inferior municipalities, such as counties, cities, etc., yet it is obviously a power which should be used with extreme caution, and only in a case of injury manifestly demanding its interposition.

It is conceded that the tax levy for 1875, which is the one sought to be enjoined, was illegal, in that it excluded from valuation and taxation

the stocks of goods held by merchants on 1 April of that year. It is no vindication of the legality of the tax to say that the city government added to the tax on the monthly sales of merchants more than enough to compensate for the deficiency caused by this exclusion. The language of the Constitution is positive, and it is imperative as to the form as well as to the substance of the tax. To disobey the mandate that all property shall be taxed uniformly and according to its value, upon the ground that the tax imposed was more just, or convenient, or productive, is to substitute the discretion of the city authorities for that of the lawmaking power. If the Constitution can be disregarded by an act of discretion in one direction, it may be in another; and an *ad valorem* tax may exclude from valuation and taxation the personal or real property of any class whatever which the authorities might think it wise and expedient to relieve. If one deliberate breach of the article of the Constitution relating to taxes can be justified, the whole article may become a dead letter in all cities and towns. Taxation should not only be substantially uniform in the result according to law, but it should be as nearly identical in form as it can be. It cannot be known to be true that the incidence of taxation was even substantially the same under the levy complained of with what it would have been under one conforming to the law. These general principles will probably not be disputed.

It is difficult, however, to devise a remedy for such a case which shall be adequate for the relief of the complaining taxpayer and free from the inconvenience of leaving it to the discretion of judges to stop the entire collection of taxes, or of a class of taxes, by injunction.

Probably if a court had been applied to in due time, it would (113) by *mandamus* have required a uniform assessment.

The difficulty calls on the Legislature for its deliberate consideration. In the meanwhile we have to consider the right of the plaintiffs to the particular remedy they have sought. They put it on the ground that although the tax is illegal, yet a sale of their land under it would be a cloud upon their title. This must be admitted, since it is by no means clear that a sale under the tax levy would not pass a good title to the purchaser, for a part of the tax is certainly owing, and the plaintiffs have paid nothing. To prevent either irreparable injury, which would be the result of a sale if valid, or a doubt upon the title, which would be the result of a sale not clearly invalid, is an ordinary ground of relief by injunction.

We think it must be assumed that the plaintiffs are injured to some extent by the omission to tax the stocks of merchants. The rate of taxation on land may have been increased somewhat by reason of the omission. At all events, if the tax on sales had been fixed at the rate it

was, and also a tax levied on the stock of goods, which it was competent for the city to do, it is evident that the tax on land might have been less than it was, for the necessities of the city required a certain sum which could be drawn from the sources of land, personal property, and sales; and whatever was omitted from one must be added to the burden on one or both the others.

We are aware that there are cases which hold that a party is not entitled to an injunction against the collection of a tax on the ground that it is not uniform, and that some property liable to taxation has been even purposely and illegally omitted from the levy. *Muscatine v.* (114) *Mississippi,* etc. 1 Dillon C. C., 537. But as long as the case of *Huggins v. Hinson,* above cited, is recognized as law, if a party so injured has no remedy by injunction, he has none at all. We think that in a case otherwise proper he would be entitled to an injunction.

There is, however, a difficulty in granting it in the present case which is insuperable. It is a familiar maxim that he who seeks equity must do equity; that is, before he can seek an injunction against a debt, he must pay so much of it as he shows to be due. This rule is supported in its application to cases like the present, by many decided cases. In High on Injunctions, sec. 363, it is said: "Where complainant has not paid that portion of the tax which is clearly valid, to which no objection is offered, and which can easily be distinguished from the illegal, the injunction will be denied, since the collection of a legal tax will not be restrained to prevent the enforcement of an illegal one. (16 Wis., 185.) And the bill itself must show what portion of the tax is legal, and what illegal, in order that the court may properly discriminate between them." (16 Mich., 176.) Cooley on Taxation, p. 536.

In the present case the land of the plaintiffs is confessedly liable to taxation. Their complaint contains data from which the illegal excess of the tax levy might be at least approximately ascertained, or if other data were needed, they might be found in the municipal records. Yet they have not paid any portion of the tax, and ask the Court to enjoin the collection of the whole, to the great detriment of the city and the confusion of its affairs. We think the plaintiffs are not entitled to the extraordinary relief demanded, and as that is the only relief demanded, their action must be dismissed.

PER CURIAM. Action dismissed.

Cited: Lemly v. Commissioners, 85 N. C., 383; *Halcombe v. Commissioners,* 89 N. C., 348; *Covington v. Rockingham,* 93 N. C., 141; *R. R. v. Lewis,* 99 N. C., 64; *Redmond v. Commissioners,* 106 N. C., 129; *Guilford v. Georgia,* 112 N. C., 36; *Moore v. Sugg, id.,* 235; *Howell v. Howell,* 151 N. C., 579.

(115)

E. H. LEHMAN v. D. A. GRANTHAM.

Taxation—Purchases of Liquors, etc.—United States Internal Revenue Tax—Stamps.

1. A dealer in spirituous liquors, etc., in listing the amount of his purchases for taxation under the revenue act (Laws 1876-7, ch. 156, sec. 10), is not entitled to deduct therefrom the amount of the United States internal revenue tax upon said purchases.
2. Liquors, etc., subject to the United States internal revenue tax cannot be *purchased* before they are properly stamped.

SMITH, C. J., and FAIRCLOTH, J., having been of counsel, did not sit on the hearing of this case.

APPLICATION for an injunction, heard at chambers on 21 November, 1877, before *Eure, J.*

The plaintiff was a wholesale liquor dealer in Goldsboro, and the defendant the sheriff of Wayne County. The purpose of this proceeding was to restrain the sheriff from collecting a certain tax which appeared upon the list delivered to the sheriff by the register of deeds of said county, to whom the plaintiff was required by law to render a statement of the amount of his purchases for taxation. The statute provides that "every dealer in spirituous or vinous liquors, porter, lager beer, or other malt liquors shall pay a tax of 5 per cent on the amount of purchases of any and all liquors." Laws 1876-77, ch. 156, sec. 10, p. 287.

The plaintiff alleged that he bought a certain quantity of liquor from the manufacturer in the State of Ohio, and that after the purchase and before the removal of the liquor he paid the United States tax thereon and had the revenue stamps affixed to the casks containing the liquor, and then removed the same to his place of business in Goldsboro. The plaintiff insisted that he was only required to list the amount of his purchases of the liquor aforesaid, and was not bound to include therein the amount of the internal revenue tax. The register of (116) deeds declined to concur in this view of the law and assessed the plaintiff's purchases in an amount including the said stamps. Thereupon the plaintiff moved for an injunction, which, upon the hearing before his Honor, was refused, and the plaintiff appealed. The objection taken in this Court by the defendant to the remedy by which the plaintiff sought relief was withdrawn, and the question waived, to the end that a decision might be had on the merits of the controversy.

Gilliam & Gatling and G. H. Snow for plaintiff.
H. F. Grainger for defendant.

READE, J. Under the United States revenue laws, no spirituous liquors can go out of the hands of the manufacturer into the hands of a purchaser for use or sale without being stamped with the United States revenue stamp. By the revenue law of 1877 for this State, a dealer in spirituous liquors is taxed upon the amount of his purchases. The plaintiff, a merchant in Goldsboro, North Carolina, purchased spirituous liquors in the State of Ohio of the manufacturer and brought them to Goldsboro, and proposed to give in his purchases of the spirituous liquors for taxation at what they cost him, less the cost of the United States revenue stamps; whereas the defendant insisted that he (117) should give in what they cost, including the stamps. The plaintiff insisted that he purchased the liquor unstamped, and then purchased the stamps and put them on it, and that United States stamps cannot be taxed by the State, and therefore he can be taxed only on his purchase of the liquor before it was stamped.

The plaintiff's mistake is in supposing that he *"purchased"* the liquor *before* it was stamped. The manufacturer could not sell and deliver, and the plaintiff could not buy and receive, the liquor until *after* it was stamped. They may have *agreed* to sell and buy, but the transaction was not complete until there was a sale and *delivery*. The liquor was not *marketable* until stamped; and whether the plaintiff or the manufacturer paid for the stamps was a matter of arrangement between them, for convenience, it may be, or for an experiment with the taxing powers. The thing purchased was the thing delivered; and the amount of the purchase was its cost as delivered. Whether the cost of transportation from the place of its manufacture to the plaintiff's place of business is not also a part of the purchase is not made a point in the record, and we express no opinion.

It is insisted by plaintiff that a United States stamp upon an article is a license to sell, and the State cannot trammel the traffic. Let us see in what sense that is true: Suppose there had been no tax on liquor, could not the manufacturer have sold it? Certainly. There having been a tax on it, and the tax having been paid, could he not have sold it just as if there had been no tax? Of course. Then in what sense is the stamp a license except as it removes a lien? But if it were otherwise, still this is not a tax on sales, but on purchases. The United States can tax every article of property just as it taxes liquor; and if that were a license to sell which the State could not trammel by taxing the (118) same articles, or sales, or purchase of them, then the State could collect no taxes at all.

It is insisted that if the State can tax stamped articles, or the sale and purchase of such, then it may tax them so high as to destroy them and prevent the United States tax altogether. But that would be sui-

cidal; for the United States can tax *everything,* and the State cannot destroy everything without destroying itself. The State cannot tax United States bonds or the salaries of its officers, or any of its means for carrying on its government; but that does not mean that the State may not raise revenue out of the property, income, trade, and occupation of its own citizens, although the same articles may be taxed by the United States. Suppose the United States lay a tax of $10 on every horse; and forbid the sale until the tax be paid and the horse branded; I have two horses, each worth $90; I pay the tax on one and he is branded; he is then worth $100 in the market; when I list them for State taxes, must I not give in one at $90 and the other at $100? and if I sell the one which is branded, and the dealer have to list his purchases, must he not list the purchase at $100? and that, although he paid the United States tax for me, to enable me to sell, and him to buy? Property is always taxed at its *improved* value, if it is improved, and by whatsoever means improved.

Injunction refused, action dismissed, and judgment here that the defendant recover his costs.

PER CURIAM. Action dismissed.

---

(119)

T. H. GATLIN AND OTHERS v. THE TOWN OF TARBORO.

Uniform Taxation—Traders—Practice—Agreement as to Notice of Private Act.

1. A tax is *uniform* when it is equal upon all persons belonging to the described class upon which it is imposed.

2. A tax levied quarterly by a town, under authority of an act of the General Assembly, upon all traders doing business in the town, "of $1 for every $1,000 worth of goods sold during the preceding quarter," is uniform and constitutional.

3. An agreement by counsel set out in the record, that the constitutional requirement of notice of the intended application to the General Assembly for the passage of a private act was not observed as to the act in dispute, cannot be accepted by the Court as conclusive. *Probably,* if it appeared either from the act itself or affirmatively from the journals of the Legislature, which would have been competent evidence in the court below, that such notice had not been given, this Court would hold the act to be unconstitutional. If the legislative journal is silent as to the fact, the presumption would be that the Legislature obeyed the Constitution.

BYNUM, J., dissenting.

MOTION to vacate an injunction to prevent the collection of certain taxes, heard at chambers on 24 December, 1877, before *Moore, J.*

The action in which this motion was made was brought by the plaintiffs on behalf of themselves and all the other taxpayers, etc., to restrain the collection of a certain tax by the officers of the town of Tarboro. By Laws 1876-77, ch. 228, which recites that "the commercial interests of the town require extra police and watch," the Legislature enacts that on 1 April, July, October, and January, in each year, every trader doing business in the town shall pay a tax of $1 for every $1,000 worth of goods sold by him during the preceding quarter, to be collected (120) by the officers of the town, and accounted for as other taxes are.

The payment of this tax is resisted on several grounds:

1. That as the traders upon whom alone it is imposed had paid or were liable to pay, in common with other property owners in the town, an *ad valorem* tax on their property, and had also paid the tax for a license to carry on their respective trades, the additional tax in question is not uniform, and that on general principles as well as by Art. V, sec. 3, of the State Constitution, it is beyond the power of the Legislature, and so, void.

2. That the act is private, and having been passed without any notice of the application as required by the Constitution, Art. II, sec. 12, it is therefore void. The fact that no notice such as the Constitution requires was given is admitted by the parties in their case agreed, but does not otherwise appear.

His Honor being of opinion with the plaintiffs, gave judgment that the injunction be made perpetual, and the defendant appealed.

J. L. Bridgers, Jr., for plaintiffs.
Fred Phillips for defendant.

RODMAN, J., after stating the case as above: *As to the first point:* The Constitution, Art. VII, sec. 7, forbids cities and towns from levying taxes except for their necessary expenses, unless by a vote of the qualified voters thereof. Whether this section by implication gives to such corporations the power to levy taxes for their necessary expenses, without any grant of such power from the Legislature, it is unnecessary to inquire. For if that be so, inasmuch as the Constitution imposes no restriction on the power except as above, but contents itself with requiring the Legislature to restrain its abuse (Art. VIII, sec. 4), the (121) power of a town to tax for its necessary expenses in the absence of any legislative restraint would be absolute and uncontrolled, except by the uncontested maxims of justice and morality found in the common law. In this case the Legislature has given the power to collect

the tax in question, and unless the Legislature was prohibited from granting the power, it is immaterial whether the act be regarded as a grant of the power or as a restraint on the general power to tax impliedly given by the Constitution.

Taking the view of the question best for the plaintiffs, and assuming the act of 1876-7 to be a legislative grant of the power to tax, is there anything in the Constitution, or in any admitted maxim of our law, prohibiting the Legislature from making the grant of this particular power to tax?

It must be admitted that there is nothing in the Constitution expressly limiting the power of the Legislature to give to towns the power to tax their inhabitants, except that above stated, to wit, that it must be for a necessary expense, etc.

It is argued for the plaintiffs, however, that as the power of the Legislature to tax for State purposes is regulated, the power of the Legislature in granting the power of taxation to towns can only extend to granting it subject to like regulations. This may follow or not. But if we concede that the town of Tarboro could levy taxes only under the regulations prescribed for the Legislature by the Constitution, the question would be, Could the Legislature impose a tax like this?

The Constitution (Art. V, sec. 3) says that the Legislature shall tax by a uniform rule all moneys, etc., and all property according to its value in money, and that it may also tax trades, etc. Although it is not expressly provided that the tax on trades, etc., shall be uniform, yet a tax not uniform, as properly understood, would be so inconsistent with natural justice, and with the intent which is apparent in the section of the Constitution above cited, that it may be admitted (122) that the collection of such a tax would be restricted as unconstitutional. But is not this tax uniform? It is argued that it is not, because it is imposed on the plaintiffs in addition to their other taxes. This objection we think cannot be maintained, because the Constitution, while it requires all property to be taxed, expressly authorizes a tax on trades, etc., which must be a tax in addition to the tax on the property of the traders, which is common to all property owners. It is also argued, and the point was much insisted on, that the tax was not uniform because it was not of the same sum on every trader, but was graduated according to the sales of the preceding quarter.

A tax on trades, etc., must be considered uniform when it is equal upon all persons belonging to the described class upon which it is imposed. Burroughs on Taxation, sec. 77, pp. 147, 159.

It may be different upon a dealer in whiskey by retail from that on a wholesale dealer, or on a dealer in whiskey from what is on a dealer in grain, etc. So it does not cease to be uniform because it is $1 on all

traders who sell to the amount of $1,000 in a quarter, they being one class, and $4 on all who sell to the amount of $4,000 in the same time, who form a different class. The same section of the Constitution allows a tax on incomes, and such a tax is always graduated by some rule according to the amount of the income. A law which imposed the same tax on every income without regard to its amount would be manifestly unjust. It may not unfairly be assumed that the profits of traders on their sales of like amount, whether of one article or another, do not materially differ, and a tax of a certain percentage on sales is intended to be, and is approximately, a tax according to profits, which is (123) not supposed to be unjust or unlawful. We are unable to see any valid objection to the act.

As to the second point: If it appeared from the act itself, or affirmatively appeared by the journals of the Legislature, which would have been competent evidence, that the notice of intended application for the act, which the Constitution requires, had not been given, we should probably hold the act void. We have not consulted the journals. That was evidence to be offered in the court below. Probably they are silent as to the fact whether it appeared that the required notice had been given or not. In that case we think the presumption would be that the Legislature had obeyed the Constitution, and that it appeared to it that the notice had been given. *Omnia presumuntur rite esse acta.* We cannot accept the agreement of the parties that no notice was in fact given as proof that it did not appear to the Legislature that the required notice had been given. In such a case the best and only proof is by the record. Our opinion on this point is supported by a recent decision in Illinois, *Happel v. Brethaner,* 70 Ill., 166.

If any weight were allowed to admissions of this sort, the law might change as each case was presented. Our opinion on this point renders it unnecessary to determine whether the act was technically a public or private one.

Judgment below reversed; and judgment in this Court that the injunction be vacated and the action dismissed and that the defendant recover costs in this Court.

PER CURIAM. Action dismissed.

BYNUM, J., dissenting.

Cited: Worth v. R. R., 89 N. C., 295, 308; *Puitt v. Commissioners,* 94 N. C., 714; *S. v. Powell,* 100 N. C., 527; *S. v. Stevenson,* 109 N. C., 733; *S. v. Moore,* 113 N. C., 699; *Rosenbaum v. New Bern,* 118 N. C., 98; *Bank v. Commissioners,* 119 N. C., 226; *Narron v. R. R.,* 122 N. C., 860; *Cobb v. Commissioners, ib.,* 312; *Commissioners v. Payne,*

123 N. C., 494; *Commissioners v. DeRosset,* 129 N. C., 280; *S. v. Carter, ib.,* 561; *Lacy v. Packing Co.,* 134 N. C., 572; *Graves v. Commissioners,* 135 N. C., 53; *Commissioners v. Packing Co., ib.,* 67; *Bray v. Williams,* 137 N. C., 390; *Cox v. Commissioners,* 146 N. C., 585; *R. R. v. New Bern,* 147 N. C., 167; *S. v. Danenberg,* 151 N. C., 720; *Land Co. v. Smith, ib.,* 75; *S. v. Williams,* 158 N. C., 613; *Dalton v. Brown,* 159 N. C., 179; *Mercantile Co. v. Mount Olive,* 161 N. C., 123, 124; *Smith v. Wilkins,* 164 N. C., 140.

Distinguished: Scarboro v. Robinson, 81 N. C., 425.

(124)

A. H. KIRBY, SURVIVING PARTNER OF KIRBY & WILSON, v. COLUMBUS MILLS.

Statute of Limitations—New Promise—Promise to Attorney.

1. A promise by M. that "he would see his brother and would pay the debt" is sufficient to remove the bar of the statute of limitations.
2. A promise (relied on to avoid the statute of limitations) made to an attorney is in law a promise made to the principal, and can be declared on as such.

APPEAL from *Cloud, J.,* at Spring Term, 1877, of CABARRUS.

This action was brought to recover the value of a promissory note made in South Carolina on 7 March, 1862, by the firm of Govan Mills & Co. (of which the defendant is alleged to be a member) to Kirby & Wilson (of which the plaintiff is surviving partner), in the sum of $216.35, payable one day after date. The answer sets up several defenses, and among them that of the statute of limitations, to rebut which the plaintiff replied a new promise made within three years next before the commencement of the suit.

On the trial before the jury the plaintiff introduced E. H. Bobo, an attorney, who testified that in 1871 the plaintiff placed the note mentioned in the complaint in his hands for collection; that he presented it to the defendant for payment, when the defendant promised that he would see his brother and would pay the debt. No other evidence of a new promise was offered. The evidence being closed, the judge remarked that he should hold that the new promise not having been made to the creditor himself, but to his attorney in whose hands the note had been placed for collection, was not sufficient to take the case out of the operation of the statute. In submission to this opinion of the court, the plaintiff took a nonsuit and appealed. (125)

A. Burwell for plaintiff.
W. J. Montgomery and Wilson & Son for defendant.

SMITH, C. J., after stating the facts as above: The only question before us is as to the sufficiency of the promise to remove the statutory bar, and the correctness of the ruling of the court thereon.

1. There have been numerous cases in this State where the Court has been called upon to decide upon the sufficiency of the words used to repel the statute, and we think they establish a principle which will include the case now before us. The following have been held sufficient to enable the plaintiff to recover, notwithstanding the lapse of time: "I have no money, but will call in a few days and settle it. I do not intend to cut the plaintiff out." *Smith v. Leeper,* 32 N. C., 86. "Unless J. R. has paid it for me, it is a just debt, and I will pay it"; and again, "It is a just debt, and I will pay it if I cannot prove that it has been settled by J. S." *Richmond v. Fuqua,* 33 N. C., 445. It has been repeatedly declared, however, that to repel the statute the new promise or acknowledgment must be an express promise to pay a certain debt absolutely or conditionally, or such an admission of facts that such promise may be inferred. In the case before us the defendant promises to see his brother and pay the very note in suit.

2. The promise to be effectual must also be made to the creditor and not to a stranger. A promise to pay a note which was afterwards transferred does not follow the transfer, and is unavailable to the holder of the note. *Thompson v. Gilreath,* 48 N. C., 493. A promise made to the other members of a firm by a newly admitted partner, to assume
(126) the liabilities of the firm, will not inure to the benefit of the creditor who seeks to enforce his demand. *Morehead v. Wriston,* 73 N. C., 398. In like manner, an agreement among partners at the dissolution of the firm whereby each partner takes a share of the joint effects, and contracts to pay certain specified debts, does not revive the creditor's cause of action which has been lost by lapse of time. *Parker v. Shuford,* 76 N. C., 219. In this case the judge who delivers the opinion of the Court says: "And that raises the question whether the promise to pay or the acknowledgment of the subsisting debt must be to *the creditor himself,* or whether it is sufficient if made to a third person. We are of the opinion that it must be made to the creditor himself."

In *Faison v. Bowden,* 76 N. C., 425, the Court says: "We have decided at this term, in *Parker v. Shuford,* that the acknowledgment or promise must be made to the creditor himself."

The judge below entirely misconceives the meaning of the Court in using the language quoted above, in supposing it was necessary that the promise should be made directly to the creditor in proper person,

and could not be made to his attorney. The Court was discriminating between the *creditor* and *persons having no privity or connection with the debt,* in saying that the former could not take benefit of a promise made to the latter to avoid the statute. But a promise made to an attorney is in law a promise made to the principal, and can be declared on as such.

We desire to repeat the suggestion heretofore made to the judges in reference to the practice in cases like the present. Had the point of law on which the nonsuit was suffered been reserved with consent of counsel, and the jury been permitted to render their verdict upon the other issues, the case might have been finally disposed of here, and thus the expense and inconvenience of another trial avoided. The verdict, if for the defendant upon the issues, may have rendered (127) the point of law reserved immaterial; and if for the plaintiff, the judge could then have set aside the verdict and directed a nonsuit. If upon the appeal it is found that he erred in this, the order setting aside the verdict would be reversed and judgment be here entered upon the verdict.

As the case comes before us, we are compelled to order a new trial.

PER CURIAM. *Venire de novo.*

Cited: Briggs v. Smith, 83 N. C., 309; *Shaw v. Burney,* 86 N. C., 332; *Hedrick v. Pratt,* 94 N. C., 104; *Hussey v. Kirkman,* 95 N. C., 67; *Davis v. Ely,* 100 N. C., 287; *Tiddy v. Harris,* 101 N. C., 592.

(128)

W. A. BLOUNT, ADMINISTRATOR OF L. O'B. BRANCH,
v.
ALEXANDER PARKER.

Statute of Limitations—Ignorance of Plaintiff—Fraud of Defendant.

1. In an action to recover damages for the conversion of personal property, the defendant pleaded the statute of limitations: *Held,* that the force and effect given by the statute to the lapse of time cannot be defeated by proof that the plaintiff did not know of the defendant's act of conversion, or that the defendant fraudulently concealed the same.
2. In such action, where it appeared that in 1865 a safe in which were certain bonds belonging to the plaintiff's estate was broken open by Federal troops, and most of the bonds stolen or destroyed, and that defendant found three of them in the public street, and took possession of them, and afterwards, in 1875, the plaintiff ascertained that the defendant had possession of the bonds, and demanded them, notifying the defendant that they belonged to the estate of his intestate, and defendant

refused to surrender them, but in a few weeks thereafter sold them and converted the proceeds, whereupon the plaintiff brought this action: it was *Held*, that the action was barred by the statute of limitations.

3. In such case the provisions of C. C. P., sec. 34, do not aid the plaintiff, even if his cause of action had accrued since the adoption of The Code.

APPEAL from *Kerr, J.*, at January Special Term, 1878, of ROWAN.

L. O'B. Branch at the time of his death in 1862 owned ten coupon bonds of this State, and six coupon bonds of Virginia, each in the sum of $1,000, and issued before the war, which were in possession of his wife in the city of Raleigh. In November of that year administration on his estate was granted to the plaintiff. On the approach of the military forces of the United States towards the city in April, 1865, these bonds, in a small tin box, were put in an iron safe and sent for safety to the town of Salisbury. A few days afterwards the
(129) Federal cavalry entered the town, the office in which the safe had been deposited was burned, the safe broken open, and most of the bonds stolen or destroyed. Three of the Virginia bonds, however, came into the possession of the defendant, being found, as he alleges, in the public street, near the office, and at the instance of the widow he was notified that they belonged to the intestate's estate and demand made for their restoration to her. The defendant refused to surrender, and in the course of a few weeks sold the bonds and converted the proceeds of sale to his own use. The plaintiff had no knowledge or information of the defendant's possession of the bonds, or of his conversion of them, until a few months before 20 August, 1875, when the action was commenced against him.

Among other defenses set up in the answer, the defendant relies upon the bar of the statute of limitations. On the trial, the court, with consent of plaintiff's counsel, reserved the question arising on the defense of the statute, and submitted issues to the jury which with the responses thereto are as follows:

1. Did the defendant convert any of the bonds specified in plaintiff's complaint, and if any, how many? Answer: Three.

2. What is the value of the bonds so converted by the defendant? Answer: One thousand eight hundred dollars, with interest thereon from July, 1865, being $3,150, with interest on $1,800 until paid.

The court being of opinion with defendant on the point reserved, and that the action was barred, set aside the verdict and directed a nonsuit to be entered, and the plaintiff appealed.

W. H. Bailey for plaintiff.
J. M. McCorkle for defendant.

SMITH, C. J., after stating the facts as above: The only ques- (130) tion before us is as to the application of the statute to the facts of this case, and whether its operation was suspended during the time the plaintiff remained ignorant of the possession and conversion of the bonds by the defendant, and began to run only at the date of discovery.

Several cases, very briefly reported in 2 N. C., were cited in support of the proposition that the statute ran only from the time when the plaintiff acquired knowledge of the tortious act, and that the defendant was liable; and there have been cases elsewhere in which it is held that in case of fraud the statute runs only from the time of its discovery. The doctrine seems to have been founded on the rule which prevails in a court of equity, and will not permit one who has fraudulently concealed his own wrongful act, and thereby prevented the suit, to set up as a defense the plaintiff's delay in bringing it. But such is not the law in this State. Here it is held, both on principle and authority, that the force and effect given by the statute to the lapse of time cannot be defeated by proof that the plaintiff did not know of the defendant's act of conversion or of his fraud. We will refer to some of our own decided cases:

In *Hamilton v. Shepherd,* 7 N. C., 115, the action was to recover damages for fraud in the sale of a land warrant, to which the defendant pleaded the statute of limitations. The plaintiff replied specially that the fraud was not discovered until within three years of the time when the action was brought. Upon the appeal the only point considered by the Court was that arising out of the statute of limitations. In delivering the opinion of the Court, *Henderson, J.,* says: "When there is a pure trust, in which case equity has exclusive jurisdiction, also in cases where there is a fraud in which equity has like jurisdiction, the court of equity will permit or not, at its discretion, lapse of time (131) to bar an investigation. But that court is bound by no statute on the subject, for the *subject-matter* is not one of the cases barred by the statute of limitations." And he proceeds to declare: "If it were on a subject-matter cognizable at law and within the cases provided for in the act of limitations, *that act is as positive a bar* in a court of equity as in a court of law." And then concludes: "For except a case in Massachusetts and a few *nisi prius* cases in this State, not a case can be found where such a rule is established, nor do I know how any should be expected. When the words of the act and of its savings are so explicit, we are not at liberty to travel out of them."

In *Baines v. Williams,* 25 N. C., 481, the defendant contracted with the plaintiff's intestate to go to Georgia, there sell a negro slave of the intestate, and collect his hire, and with the moneys on his return home pay a judgment recovered by one Boykin against the intestate. The

defendant did not apply the moneys to the judgment, but appropriated them to his own use. The plaintiff remained ignorant of the misapplication of the fund for many years, and supposed the debt had been discharged. In delivering the opinion of the Court, *Gaston, J.*, says: "As to the matters stated in the case tending to show that the plaintiff's intestate had been kept in ignorance, or *had been deceived* by the defendant in regard to his breach of the engagement, or furnishing some excuse for the delay in bringing suit, we have only to say that in a court of law they cannot avail to take the case out of the operation of the statute. *Hamilton v. Shepherd,* 7 N. C., 115. Whether they can be urged with more effect in another tribunal it is unnecessary to inquire." See, also, *Troupe v. Smith,* 20 Johns. (N. Y.), 33. We fully concur in this exposition of the law as applicable to the facts of this case.

We have not overlooked paragraph 9, sec. 34, C. C. P., which provides that when relief is asked on the ground of fraud, the statute
(132) shall run only from the discovery of the fraud by the aggrieved party, "*in cases* which heretofore were solely cognizable in a court of equity." This act if applicable would not aid the plaintiff, as he is asserting a legal right in a form of proceeding substituted for an action at law, and entirely outside the jurisdiction of a court of equity. The act, however, may be regarded as a legislative declaration that the effect of the statute cannot be defeated, even in case of undiscovered fraud, unless the fraud is such that the jurisdiction of a court of equity was alone competent to afford relief. Such seems also to be the opinion of this Court as intimated in the recent case of *Batts v. Winstead,* 77 N. C., 238. But as the plaintiff's cause of action accrued in 1865, it is governed by the law as contained in the Rev. Code, ch. 65, sec. 3.

We therefore sustain the ruling of the court, that the plaintiff's action is barred.

PER CURIAM. Affirmed.

Cited: Kahnweiler v. Anderson, post, 144; *Egerton v. Logan,* 81 N. C., 179; *Hughes v. Whitaker,* 84 N. C., 642; *University v. Bank,* 96 N. C., 286; *Syme v. Badger, id.,* 206; *Jaffray v. Bear,* 103 N. C., 167; *Alpha Mills v. Engine Co.,* 116 N. C., 803; *Holden v. Royall,* 169 N. C., 678.

Distinguished: Burwell v. Linthicum, 100 N. C., 149.

(133)

KARL KAHNWEILER v. JAMES ANDERSON.

Bill of Exchange—Equitable Assignment—Parties—Practice—Negligence—Demand—Statute of Limitations.

1. The intention to assign a fund in the hands of another, founded upon sufficient consideration and expressed by a bill of exchange, operates as an equitable assignment on the payee.
2. A., living in this State, had a certain fund to his credit in the hands of B. in New York, and on 30 July, 1861, gave to C., for sufficient consideration, a bill of exchange upon B. for the whole amount of the fund; the bill of exchange was immediately indorsed by C. to D. (residing in New York) and mailed to his address, civil war between the States being then raging; the bill of exchange was never received by D., nor had he notice of it until 1866, when he was informed of the remittance by C., who had, however, then forgotten of whom he had purchased the bill; in 1865 the fund in the hands of B. was collected of him by A.; in 1876 C. ascertained, by finding a memorandum upon an old check book, that the bill of exchange had been purchased from A.; D. thereupon, in 1876, made a demand upon A. for payment to him of the fund, which A. declined to pay, and D. thereupon instituted suit against A. for the same: *Held*, that D. was entitled to recover.
3. In such case the action is properly brought in the name of D.
4. In such case, even if it was negligence upon the part of C. to have forwarded the bill of exchange by mail, A. was contributory to it, and cannot take advantage of it.
5. In such case D. (independent of the act suspending the statute of limitations) is *prima facie* excused from making a demand on A. for payment until the restoration of peace, and is also excused, under the circumstances, from making a demand on B.
6. In such case the statute of limitations did not begin to run against D. until after the demand made by him upon A., in 1876, for the amount of the fund.
7. When the statute of limitations is relied upon as a defense, it can be taken advantage of only by answer.

SMITH, C. J., and RODMAN, J., dissenting.

APPEAL from *Seymour, J.*, at June Special Term, 1877, of (134) NEW HANOVER.

The demurrer of defendant admits the facts as alleged in the complaint, and they are these:

On 30 July, 1861, David, Daniel, and Jacob Kahnweiler were merchants and copartners in business in the city of Wilmington, North Carolina, under the name of Kahnweiler & Brothers, and on that day were indebted to the plaintiff, Karl Kahnweiler, in the sum of $1,900, the said Karl being then a citizen and resident of the city and State of New York. On the said day the defendant Anderson applied to

Daniel Kahnweiler to know if he desired to purchase exchange on New York, at the same time informing him that he had to the credit of Anderson & Savage, in the hands of Montel & Bartow in the city of New York, the sum of $1,804.57. The said Anderson & Savage had been late copartners in business in the city of Wilmington. Daniel agreed to take the said exchange at the rate of 5 per cent premium, and accordingly paid Anderson the sum of $1,804.57, and the further sum of $90.23, being 5 per cent premium on the same, and took from the said Anderson a bill of exchange drawn in the name of Anderson & Savage, and directed to the said Montel & Bartow, and payable to the order of Kahnweiler & Brothers, for the sum of $1,804.57 at sight. On the same day the said Daniel, in the name of Kahnweiler & Brothers, indorsed the same to be paid to the said Karl Kahnweiler or his order, and the said bill of exchange was on the same day inclosed in a letter and deposited in the post-office in Wilmington, addressed to the said Karl in the city of New York.

In August, 1865, said Daniel being then in New York, the plaintiff Karl applied to him for payment of the debt due him by Kahnweiler & Brothers, and the said Daniel informed him that Kahnweiler &
(135) Brothers had paid the debt by a draft on some house in New York, which had been sent in 1861; but whose draft it was, or on whom drawn, the said Daniel could not then recollect. The said Daniel was then for the first time informed that the draft had never been received, and that the debt remained unpaid.

In January, 1865, on account of the war then prevailing between the North and South, the said Kahnweiler & Brothers had removed all the books of their firm in Wilmington to Charlotte for greater security, and some were sent from Charlotte to New York in 1865, after the close of the war. The books were removed to Wilmington in 1866 or '67. During those years the said Daniel made diligent search for some evidence of the said bill of exchange, but without success. The only memorandum of said bill was made on the margin (commonly called the "stub") of a check book, and it was not until March, 1876, that a memorandum of the check which was given in payment of the draft drawn by Anderson & Savage on Montel & Bartow was found by the said Daniel. Then for the first time was discovered on the margin of the check book a memorandum of the check given in payment for the bill of exchange. This check was duly paid on the same day it was given to Anderson & Savage, but the bill of exchange drawn by Anderson & Savage on Montel & Bartow has not been paid by the said drawer or the said Montel & Bartow.

In March, 1866, James Anderson directed Montel & Bartow to pay over to him the said sum of $1,804.57 and interest thereon, which sum

was accordingly on 1 March, 1866, so paid over to James Anderson. On the discovery of the memorandum in the check book the said Daniel recollected the fact of obtaining the bill from James Anderson, and on 18 May, 1876, as agent of the plaintiff, demanded of the defendant the said sum of money, tendering at the same time a good and (136) sufficient bond of indemnity, etc.

It was contended by the plaintiff that the bill of exchange so made payable to the order of Kahnweiler & Brothers, and by them indorsed to the plaintiff, although not presented to or accepted by the drawees, Montel & Bartow, constituted an equitable lien upon the fund of the drawer in the hands of the drawees, by virtue of which the plaintiff can follow the fund, at least in the hands of the drawer himself.

On the hearing, his Honor being of opinion with plaintiff, gave judgment that the demurrer be overruled and defendant have leave to answer over. He also held that the statute of limitations did not bar the action. From which ruling the defendant appealed.

D. L. Russell for plaintiff. (137)
A. T. and J. London for defendant.

BYNUM, J., after stating the case as above: The general question is much discussed by the text-writers and the decisions, whether a bill of exchange, though drawn upon the whole of a specific fund to the credit of the drawer, *of itself* can operate as an equitable assignment of the fund, unless the drawee elects to pay the bill; and a distinction is drawn between a *draft* or *order* so drawn, which all admit does constitute such an assignment, and a bill of exchange, which many deny does so operate. Both instruments being negotiable, the distinction in their effect as applied to the vast dimensions and activity of modern commerce seems too refined and technical.

We, however, do not enter into that discussion, as our case steers clear of the controversy. The dispute here is not between the holder of the bill and the drawees, but between the holder and the drawer. The rights of the holder against the drawees without or with notice are out of the question; therefore much of the discussion at bar is inapplicable. For it is entirely clear to the Court that, even admitting that an ordinary bill of exchange, whether payable generally or out of a specific fund, does not of itself give the holder a lien upon the funds of the creditor in the hands of his debtor, this bill of exchange in connection with the other facts does show an intention on the part of the drawer to assign the fund to the payees, Kahnweiler & Brothers, or to their order. As between these two parties, the question of assignment is one of intention. The intention to assign founded on a sufficient consideration operates as an equitable assignment. The principle is thus stated: "If A., having

a debt due him from B., should order it to be paid to C., the order would in equity amount to an assignment of the debt, and would be (138) enforced in equity, although the debtor had not assented thereto." Story Eq. Jur., sec. 1044, and notes; 1 Daniel on Neg. Instr., sec. 21.

There can be no manner of doubt as to what the parties meant by their agreement in this case. The defendant approaches Daniel Kahnweiler and informs him that he has the sum of $1,804.57 to his credit, in the hands of Montel & Bartow in New York, and asks to know if he wishes to purchase exchange on that city. A bill of exchange for the exact amount in the hands of Montel & Bartow is bought and paid for. It does not appear that the defendant ever had another or different sum to his credit on that firm, no other was alluded to, and the transaction was in reference to this specific fund alone. This occurred in the early period of the war between the States, but before commercial intercourse had been legally terminated between them. 91 U. S., 7. Apprehending, doubtless, the confiscation or loss of this sum to his credit in New York, the defendant desired to withdraw it, and hence himself took the initiative to that end. Kahnweiler & Brothers owed a debt of similar amount in New York, and the purchase of the exchange was to the mutual accommodation of the parties. It was, of course, in the contemplation of both that the bill of exchange would at once be remitted to New York in the usual course of business. Nothing else could be done. It does not lie in the mouth of the defendant, therefore, now to urge that it was *laches* in the payee to remit the bill through the post-office, while war was flagrant. It would have been *laches* to have done otherwise.

On the day the bill was drawn, 30 July, 1861, it was forwarded to the indorsee in New York through the mail, the regular channel of transmission recognized by commercial usage. It is not necessary to decide whether the deposit of the bill in the post-office, addressed to the indorsee, whether with or without his consent, was a sufficient (139) delivery so as to throw the loss on him, who should have received it. That is a question between the indorser and the indorsee. The defendant had parted with the title and possession by the delivery of the bill to the payee, and the only concern he has in the question is to know that the action against him is brought in the name of the proper party in interest. He does object that the plaintiff is not that party. This objection is technical only. It does not go to the merits, and when interposed to evade a trial upon the merits, is viewed with disfavor. It presents no difficulty here. When the plaintiff is informed by his indorser of the facts, and of the remittance of the bill, he ratifies the act, does not look to his indorser, but passes him by, makes demand of

and brings his action against the drawer. A ratification of an act has in general the same effect as a previous authority. When, therefore, the plaintiff thus assented to the act of the indorser in remitting the bill which constituted a lien upon the fund, he became as from the indorsement clothed with the rights of the indorser, and is the proper party to the action.

Assuming that the bill was an equitable assignment of the fund as well to the plaintiff as to his indorser as against the defendant Anderson, who knew the purpose for which the exchange was purchased and is therefore presumed to have assented to the indorsement of the bill as well as to the mode of remittance, the material question is whether the plaintiff has by his *laches* in making demand lost his lien upon the fund as against the defendant.

The bill was mailed to the address of the plaintiff the day it was drawn. This was 30 July, 1861. Civil war was then raging between the States, and some of the greatest battles of the war had been fought. When he sold the bill, the defendant knew the risks which would attend the remittance to New York, a belligerent State, as well as the party with whom he was dealing. He was anxious to withdraw his funds from a hostile territory and induce the payee to purchase the exchange. If it were negligence in the payee to forward the (140) bill by mail at that time, the defendant was contributory to it, and cannot take advantage of it. A state of war between the country of the maker of the bill and the holder is a well recognized excuse for absence of demand for payment. And this excuse is valid whether commercial intercourse between the hostile States had been interdicted by law or not, provided intercourse had in fact been obstructed or suspended by existing hostilities. The courts take judicial notice of a state of war, and its usual consequences. These facts, irrespective of the acts suspending the operation of the statute of limitations, at least *prima facie* excuse a demand until the restoration of peace, immediately after which he resumed possession of the fund.

The loss of the bill, the ignorance of the plaintiff of its ever having had an existence, and the obstructions of all the channels of communication between the indorser and the plaintiff, excused a demand upon the drawees. It would be a great hardship and a perversion of justice to hold the plaintiff to a loss of his debt where events, over which he had no control, morally and physically prevented his giving notice to and making a demand of the drawees, when the failure to do so has worked no injury to the defendant. The law does not require impossibilities. But the drawees did not hold the fund adversely to the plaintiff. They simply had no notice of his claim, and therefore were justified in paying over the fund to the order of the defendant, their principal.

As between the drawer and drawees without notice, the withdrawal of the fund by the former was rightful. Was this act wrongful as to the plaintiff, and did it of itself give him a cause of action and set the statute in motion?

We are now in a court of equity, where we are to determine the nature and effect of this act of resuming the possession of the
(141) fund by the defendant in the light of all the facts admitted by the demurrer.

We have before seen that as between the plaintiff and the defendant, the former had an equitable lien upon the fund now in the hands of the latter. The law presumes that this lien and trust subsist, and they do subsist until they are terminated by some act showing the unequivocal purpose of the defendant to terminate that relation between the parties. Once a trust, always a trust. The Court is therefore slow to put an end to a trust, or allow the parties to do so, before the obligations of it are performed. It will, in the interest of justice and fair dealing and to prevent manifest wrong, construe all acts in themselves equivocal, consistently with the contract of the parties, so as to uphold and not destroy the lien. While it is true that the drawees, Montel & Bartow, not having been fixed with notice of the bill drawn upon the fund in their hands, were in no default in paying it over to the defendant, it is yet clear that had they retained it until the bill, its loss, and the parties to it, had been ascertained as described in the complaint, they would have been, after notice, amenable to the plaintiff upon the equitable assignment to him.

It is difficult to see how the defendant, who is in privity with the drawees, can put himself in a better position than they, by repossessing himself of the fund.

To give his act that effect would be to allow him to take advantage of his own wrong. If the bill was originally an equitable assignment of the fund in the hands of Montel & Bartow, it cannot be less so of the same fund in the drawer's hands. It is equally affected still. The drawer cannot by any equivocal act divest himself of the lien impressed upon the *fund* by himself. His act in resuming the fund is easily explained, without imputing to him any purpose to put himself in hostility to his contract in assigning the fund. Indeed, by taking the fund out of the hands of his agents, and into his own, he enabled himself the more effectually to discharge his liability upon the bill.
(142) The fund has remained five years in the hands of his bankers, Montel & Bartow, uncalled for by the plaintiff. It might never be called for. Between himself and his bankers he was entitled to it. His bankers might fail and he be called upon to make good the loss. His purpose might have been the honest one to see that the fund set

apart by him for the payment of the bill should be applied to that purpose upon the proper presentation of the plaintiff's claim. When he resumed possession of the fund he did not avow any claim to it adverse to the plaintiff, or to the previous assignment he had made of it. Until the contrary appears, the law presumes that an act in itself, at most, equivocal, was done for an honest and not a dishonest purpose and in violation of the precepts of justice and morality. By repossessing the fund, the defendant became in effect both the drawer and the drawee of it, with the presumption in his favor that he held it only until a demand by the holder of the bill. This presumption lasted until the demand was made upon him, to wit, May, 1876, when for the first time he claimed adversely and refused payment. Then and not before was the bill dishonored, and the plaintiff put to his action.

Prior to that time we think the plaintiff was excused for nonpresentment and nondemand. If an excuse is available at all, its benefits must be coextensive with its subsistence without regard to its duration. It is true that the period here was long, perhaps longer than any presented in the books, but the facts of the case are remarkable and exceptional, and the mere lapse of time of itself cannot prevent the application of the same reasons constituting "excuse," to this case, as to all others. We do not see that any principle of law or rule of equity is violated in holding the defendant accountable for the money of the plaintiff, which he has in his pocket and refuses to pay him. The action having been instituted within three years from the demand, the statute (143) of limitations cannot avail the defendant.

We have expressed our opinion upon a plea of the statute as a bar to the action, because the question has been fully argued as though it was properly before us, and because the parties desired our opinion as necessarily affecting the further prosecution of the action. For it has been expressly decided by this Court that under our Code, where the statute of limitations is relied on as a defense, it can be taken advantage of only by answer. The objection cannot be taken by demurrer. *Green v. R. R.*, 73 N. C., 524.

No citation of authorities has been made in the course of this opinion. The general principles governing such cases will be found fully discussed in the elementary works upon the subject, by Story, Parsons, and Daniel. See Story on Prom. Notes, secs. 257, 262; Eq. Jurisprudence, sec. 1044 and notes; 1 Parsons on Notes and Bills, 332, 461, and ch. 11; 1 Daniel on Neg. Instr., secs. 21, 22; 2 Daniel, secs. 1173, 1181; *Row v. Dawson,* 3 T. and W. Leading Cases in Eq., 212, and the exhaustive notes thereto. Also, *Maundeville v. Welsh,* 5 Wheat., 286; *Tieman v. Jackson,* 5 Pet., 580; *Winter v. Drury,* 5 N. Y., 525; *Harris v. Clark,* 3 N. Y., 115; *Harrison v. Williamson,* 2 Edw., ch. 438; *Cowperthwaite*

v. Sheffield, 3 Const., 243; *Bank v. Bogy,* 44 Mo., 13; *Windham Bank v. Norton,* 22 Conn., 213.

SMITH, C. J., dissenting: While I concur in the disposition made by the Court of this cause, on the authority of *Green v. R. R.,* 73 N. C., 524, I think the plaintiff's action is barred by the statute of limitations.

When the defendant withdrew and appropriated to his own use the fund which by his draft he had assigned to the plaintiff, he violated an implied contract that the money should remain to meet the draft, and became instantly liable to an action.

Nor was the operation of the statute suspended until he knew (144) of the defendant's receiving and misapplying the money, as under the former practice his remedy would have been an action at law, and not exclusively if at all cognizable in a court of equity. C. C. P., sec. 34 (9); *Blount v. Parker, ante,* 128.

RODMAN, J., dissenting: I concur in the opinion of the Court in every respect except that I think the statute of limitations bars the plaintiff's recovery. When defendant received the money from Montel & Bartow, he took what was the property of the plaintiff, and the statute began to run from that time. It is immaterial that it had become the property of the plaintiff by an assignment, which would be recognized as an assignment only in a court of equity. It passed a legal estate and did not create a trust.

The defendant took the property tortiously, as between him and the plaintiff, and held it adversely, as any other trespasser or disseizor does. He did not take it as agent or trustee for the plaintiff. If *he* did, every other man who takes another's property without his knowledge takes it as his agent or trustee.

In *Blount v. Parker, ante,* 128, it is held that the fact that the owner of the property was ignorant of the trespass will not prevent the statute from running. The statute of limitations is based upon the opinion that it is better that a just right shall sometimes be lost than that claims shall be made after the times fixed by the statute, which defendants may be unable to disprove, however false. It is a statute of repose.

PER CURIAM. Judgment affirmed.

Cited: Lynn v. Lowe, 88 N. C., 483; *Hawes v. Blackwell,* 107 N. C., 201; *Howell v. Manufacturing Co.,* 116 N. C., 812; *King v. Powell,* 127 N. C., 11.

(145)

W. A. SOSSAMAN AND OTHERS v. THE PAMLICO BANKING AND INSURANCE COMPANY.

Fire Insurance—Condition of Forfeiture in Policy.

In an action to recover on a policy of fire insurance, where it appeared that the policy contained a condition that "when property (insured by this policy) or any part thereof shall be alienated, or in case of any transfer or change of title to the property insured or any part thereof or of any interest therein, without the consent of the company indorsed thereon, . . . this policy shall cease to be binding upon the company," and that the plaintiff after the issuing of the policy had mortgaged the property insured, with power of sale, etc.: *Held*, that the policy was thereby forfeited and the plaintiff was not entitled to recover.

ACTION to recover the amount of a fire insurance policy, tried at Fall Term, 1877, of IREDELL, before *Cloud, J.*

The plaintiff insured with the defendant a certain stock of goods which he then had in a certain storehouse in Iredell County, against damage by fire, from noon on 20 November, 1875, to noon on the same day, 1876. On 16 November, 1876, the stock of goods was totally destroyed by fire. The policy of insurance contained, among other terms and conditions, the following:

"V. When property (insured by this policy) or any part thereof shall be alienated, *or in case of any transfer or change of title to the property insured, or any part thereof, or of any interest therein,* without the consent of the company indorsed thereon, or if the property hereby insured shall be levied upon, or taken into possession or custody on any legal process, or the title to or possession be disputed in any proceeding at law or in equity, this policy shall cease to be binding upon the company."

On 17 May, 1876, the plaintiff being indebted to Cohen & Rosler in $881.95, mortgaged the goods aforesaid and also a certain piece of land and other personal property to them, with power to sell the property if the debt was not paid by 1 October, 1876, on giving (146) twenty days notice of the sale. This mortgage was duly registered.

His Honor was of opinion upon these facts that the plaintiff could not recover, and he thereupon submitted to a nonsuit and appealed.

R. F. Armfield and John Devereux, Jr., for plaintiff.
Shipp & Bailey for defendant.

RODMAN, J., after stating the facts as above: To cite and analyze the numerous cases to which we were referred on the argument would be a labor without any useful result. They may be found collected in May

on Insurance and in the briefs of the counsel. They generally turn on the language of the condition under which a forfeiture of the policy is claimed to have been incurred. It has been held that under a condition against alienation no forfeiture is incurred by mortgage of the property, at least not until foreclosure, although the right to redeem has been lost at law and turned into an equity. This is because in many of the Northen States a mortgage is not regarded as creating an estate in the mortgaged property, but merely a lien on it. A somewhat different view has been commonly taken in this and other States. But we were referred to no case in which it was held that giving a mortgage did not work a forfeiture, where the terms of the condition were as comprehensive as they are in this case.

There are two considerations on which it seems to me the (147) question of forfeiture may always be fairly and reasonably decided:

1. Does the making of a mortgage come within the words of the condition as commonly understood? If it does not, a forced meaning should not be put on the words in favor of the company; while if it does, the natural and usual meaning must be allowed to them, notwithstanding the conditions are in fine print, if it be legible.

If in deference to what seems the weight of decision we admit that a mortgage is not an alienation even after a forfeiture of the legal estate by nonpayment of the debt at maturity, yet it must be considered under such circumstances as making a material change in the interest of the insured in the property; at least as much as a levy upon and seizure of the goods under execution, which is specially named as a ground of forfeiture. Both, at law, take the property out of the mortgagor and vest it in another person; while in substance both are merely liens, from which the property may be exonerated by payment.

2. When, as in this case, the making of a mortgage comes within the apparent meaning of the words in the condition of forfeiture, it is proper then to consider whether there is anything in the nature of the contract or in the purposes for which it was entered into to control this apparent meaning and restrict the words used. A reason why the company might intend to, and might prudently require that any diminution of the interest of the insured in the property should work a forfeiture, unless consented to by it, is obvious. No company will generally insure property for its full value. To insure it for more than its value is justly regarded as hazardous and an inducement to fraud. A company looks to the amount of interest in property which an insured has at risk as a principal reason for expecting from him care and watchfulness to protect it from loss. Every diminution of the interest of the insured tends to diminish the watchfulness which is impliedly stipulated for,

and when that interest is substantially wholly parted with in (148) any manner, it is equivalent to an absolute alienation, which is admitted to be a ground of forfeiture. In many cases a mortgage on property to its value, or for even less, is substantially an alienation; for although after a loss of the property the debt or the residue of it would continue owing, yet the insured might little regard his mere personal liability. At all events, it is neither unreasonable nor unjust to introduce in a policy such a condition of forfeiture. There is nothing in it to lead to a suspicion of fraud or deception on the insured, and having deliberately and knowingly entered into it, there is no more reason why it should not be enforced against him than the terms of any other contract would be.

PER CURIAM. Affirmed.

Cited: Biggs v. Insurance Co., 88 N. C., 143; *Gerringer v. Insurance Co.*, 133 N. C., 412; *Modlin v. Insurance Co.*, 151 N. C., 41; *Watson v. Insurance Co.*, 159 N. C., 640; *Roper v. Insurance Co.*, 161 N. C., 155.

(149)

JOHN C. McCRAW, TRUSTEE, v. THE OLD NORTH STATE INSURANCE COMPANY.

Fire Insurance—Premium Notes—Stipulation of Forfeiture—Waiver—Estoppel—Evidence—Contemporaneous Declarations.

1. Where in an action to recover upon a policy of fire insurance, the testimony of P. (one of the parties insured) was attacked by proof of declarations made by him during the progress of the fire, whereupon P., on being recalled, testified that he had made such declarations while excited and confused by the fire, without reflection, etc.: *Held*, that other declarations of P. as to the state of his mind, made to another witness during the continuance of the fire, were contemporaneous with the first, and admissible in evidence.
2. In such case evidence that shortly after the fire the condition of P. was such as to excite the attention of one of his friends, who in consideration thereof advised P. to take a drink of liquor, was relevant and admissible.
3. Where, in such action, it appeared that the premium for the insurance was not paid in cash, but a note given therefor, and the policy contained a stipulation that "no insurance shall be considered as binding until the actual payment of the cash premium; but where a note is given for cash premium, it shall be considered a payment, provided the notes are paid when due, and it is hereby stipulated and agreed by and between the parties that in case of loss or damage by fire to the property herein

insured, and the note given for the cash premium or any part thereof shall remain unpaid and past due at the time of such loss, this policy shall be void": it was *Held* (the said note having been past due and unpaid at the time of the fire), that evidence that the defendant company by previous transactions with the plaintiff and others had extended similar notes would warrant a jury in coming to the conclusion that the defendant was estopped from denying an agreement for extension and insisting upon a forfeiture.

4. If an insurance company intentionally by language or conduct leads its policyholders to believe that they need not pay their premium notes promptly, and that no advantage will be taken of the failure, it is equivalent to an express agreement to that effect, and is a waiver of any forfeiture expressed in the policy therefor.

(150) APPEAL from *Buxton, J.*, at Spring Term, 1877, of WARREN.

This action was brought by plaintiff as trustee of Perkinson & Nicholson to recover the sum of $2,000, the amount of a policy of insurance issued by the defendant company to Perkinson & Nicholson, on 27 October, 1874 (and continued in force by renewals), insuring their storehouse and stock of goods in Warren County. The amount of the premium ($30) was not paid in cash, but a note was given therefor, payable on 1 February, 1876, to keep the policy in force from 27 October, 1875, to 27 October, 1876, and the defendant gave the ordinary renewal receipt. The property covered by the insurance was destroyed by fire on 11 April, 1876. No part of said note was ever paid, but the amount was tendered to the defendant after the fire, and refused. The policy contains the following provision: "No insurance, whether original or continued, shall be considered as binding until the actual payment of the cash premium; but when a note is given for cash premium, it shall be considered a payment, provided the notes are paid when due; and it is hereby expressly stipulated and agreed by and between the parties that in case of loss or damage by fire to the property herein insured, and the note given for the cash premium, or any premium, or any part thereof, shall remain unpaid and past due at the time of such loss or damage, this policy shall be void and of no effect."

Perkinson testified that B. F. Long, the general manager and secretary of the company, had agreed by parol with him to extend the time of payment of said note for ninety days after its maturity; that in previous transactions with the company the time for payment of similar notes had been extended, and that when he first asked for this indulgence, he requested said Long to give him some written evidence of the extension, and that Long replied, he only made a minute to that effect in a book kept for that purpose.

Long testified that the time of payment of this particular note (151) had not been extended, and admitted the custom and manner of

extension as stated by Perkinson; that the conversation about extending the time on this note occurred in his office, and it was his universal habit, so far as he could remember, when extending the time of payment of a premium note, if he was in his office, to make a minute of the fact in his book of bills receivable; and that this book had no entry in it extending the time upon the note in question. He then testified as to the manner of conducting the business of the company in respect of extension of time upon such notes, etc.

Davis, a witness for the defendant, testified that at the fire "he asked Perkinson if the property was insured; and he replied, he did not know; he did not think it was; he was afraid he had let the time pass by; he had asked Nicholson to attend to it, and did not know whether he had done so or not." Another witness testified "that he, also, immediately after the fire, asked Perkinson about his insurance, and he replied, he could not tell, but he did not think he would have neglected so important a business; that Mr. Nicholson had gone to Warrenton to see about it." Perkinson was then recalled, and stated "that he was so excited and confused by the fire, he at the time had no recollection of the agreement to extend the payment of the premium note; that he had responded to the inquiries without reflection and at a time of great excitement and distress"; and to corroborate this explanation, the plaintiff introduced one Fitz, and proposed to show by him that while the property was burning he also asked Perkinson if it was insured, and that "he replied, he did not know; his mind was so confused and excited, he could not recollect." Upon objection, this evidence was excluded by his Honor on the ground that the declaration was made, if made at all, at a different time from the declarations testified to by Davis and the other witness. The witness, however, was allowed to say that Perkinson appeared to be much disturbed and depressed. The plaintiff also (152) offered to show "that shortly after the fire had subsided Perkinson's mental condition was such as to excite the attention and remark of one of his friends who had come to see him, and to call for the advice of this friend, that he was so much affected it would be better for him to take a drink of liquor." This was objected to by defendant, and excluded.

The plaintiff asked the court to charge "that a forfeiture by reason of the nonperformance of a condition subsequent was not favored, and the waiver of the forfeiture by the company might be inferred from the dealing of the company with the insured, and from the known custom of the company with reference to matters insisted on as working the forfeiture, as well as it might result from express agreement." His Honor responded: "The forfeiture for nonpayment of premium note at maturity is a provision in favor of the insurance company, which they may waive

by an *express* agreement for an extension; and such agreement, if made, needs no consideration to support it." Verdict for defendant. Judgment. Appeal by plaintiff.

Moore & Gatling for plaintiff.
J. B. Batchelor, C. A. Cook, and L. C. Edwards for defendant.

RODMAN, J. The plaintiff was not entitled to a judgment upon the verdict, because the jury found that the company had not extended the time for the payment of the premium note; and by the terms of the policy in such case it was void. We think, however, he is entitled to a new trial for the reasons which we proceed to state:

1. Perkinson, one of the owners of the property insured, had given evidence tending to prove that the company by its agent had agreed to extend the time for the payment of the premium note for ninety days after 1 February, 1876. To weaken this evidence, the (153) defendant put in evidence declarations of Perkinson made while the fire was in progress, tending to prove the contrary, and that the policy had become void by his neglect to pay the premium note when it had become due. To explain these declarations, Perkinson was recalled and stated that during the fire he was excited and confused; that he had answered the questions put to him without reflection, and did not then remember that the time for paying the premium note had been extended. To support this testimony of Perkinson, the plaintiff called in one Fitz, and proposed to show by him that while the fire was burning he also asked Perkinson if the property was insured, and that Perkinson had replied that "he did not know; his mind was so confused and excited he could not recollect." This testimony of Fitz was objected to and excluded by the judge, and plaintiff excepted. The judge, however, allowed Fitz to say that Perkinson appeared much disturbed and depressed.

The ground of the objection was that this declaration to Fitz was not contemporaneous with those previously proved, and could not, therefore, qualify or explain them. However that might be, if the declarations had been as to some other subject, we are of opinion that they ought to have been received. Declarations as to the present state of the feelings or health are always competent when this is the question; and these were so nearly contemporaneous with those previously proved, and while the same state of circumstances continued, that they must reasonably be considered, in reference to the purpose for which they were introduced, as contemporaneous.

2. The plaintiff then offered to prove that shortly after the fire had subsided, Perkinson's mental condition was such as to excite the atten-

tion and remark of one of his friends, who, in consideration of it, advised him to take a drink of liquor. This was objected to and excluded, and plaintiff excepted. We think this evidence was (154) competent. It consists of two parts: one, as to the actual condition of Perkinson's mind, which was certainly competent; and the other, as to the advice of his friend, which was relevant as tending to show to what extent the witness thought Perkinson's mind was affected. When evidence tends fairly to prove the matter in dispute, although it may be by itself weak, courts are not disposed to reject it. The jury will pass on its collective weight.

3. The plaintiff requested the judge to instruct the jury that a forfeiture by means of the nonperformance of a condition subsequent was not favored; and the waiver of the forfeiture by the company might be inferred from the dealing of the company with the insured, and from the known custom of the company with reference to matters insisted on as working the forfeiture, as well as it might result from express agreement. This the judge declined to do, and instructed the jury that "the forfeiture for nonpayment of the premium note at maturity is a provision in favor of the insurance company which they may waive by an *express* agreement for an extension, and such agreement, if made, needs no consideration to support it."

Substantially, the only matter in dispute between the parties was as to the extension of the premium note for ninety days after it fell due. There was the evidence of Perkinson to the effect that there had been an express agreement for extension; and it might have been, and probably was argued, that there was in the testimony of Long matter which supported Perkinson. Independently of this, it was agreed for the plaintiff that the course of dealing by the company with Perkinson, and with other policyholders to his knowledge, as testified to by Long, estopped the company from denying an agreement for extension, and from insisting on a forfeiture. As there is to be a new trial, it will be sufficient to say that there was evidence upon which the (155) jury might, under proper instructions, have come to this conclusion. Long stated the course of dealing. He also stated that the company thought it good policy not to urge the prompt payment of the premium notes, as while they lost nothing by it, they were not during such indulgence bound for any loss. It is scarcely necessary to say that such a course of dealing with such a view, which could not have been known to the insured, was unfair and calculated to deceive them. It was also a mistake in law; for it cannot be doubted that if a company intentionally by language or conduct leads its policyholders to believe that they need not pay their premium notes promptly, and that no advantage will be taken of the failure, it is equivalent to an

express agreement to that effect, and is a waiver of the forfeiture. It will be sufficient in support of this doctrine to cite May on Insurance, secs. 360, 361, and the cases there referred to, which fully sustain it.

The judge by his instruction in effect says that there can be no waiver except by an *express* agreement, and deprived the plaintiff of any benefit from the other view of the case. He also omitted to inform the jury that the company was bound by the acts and representations of its general agent within the line of his employment, a proposition of law which the plaintiff had urged and the defendant had denied. May on Insurance, secs. 143, 144; *Insurance Co. v. Wilkinson,* 13 Wall., 222.

This case differs essentially from *Ferebee v. Insurance Co.*, 68 N. C., 11, in which the agent agreed to receive payment of the premium in a debt owing by himself, which could not be supposed to be within the scope of his agency, and the company had notified the plaintiff that the premium must be paid or the policy would be forfeited.

PER CURIAM. *Venire de novo.*

Cited: Wood v. R. R., 118 N. C., 1065; *Hay v. Association,* 143 N. C., 259; *Bank v. Hay, ibid.,* 336; *Murphy v. Insurance Co.*, 167 N. C., 336.

---

(156)

K. M. C. WILLIAMSON v. LOCK'S CREEK CANAL COMPANY.

Riparian Proprietor—Action for Damages for Diverting Water —Lock's Creek Canal Company—Practice—Assignment of Error in This Court—Liability of Individual Corporators—Parties.

1. A proprietor of land, through which a water-course flows, has a right to a reasonable use of water, provided he does not by his use of it materially damage any other proprietor of land above or below.
2. In an action for damages for diverting water from a stream flowing through plaintiff's land and used by plaintiff, brought against the owners of land above, the plaintiff is not required to show his right to use the water by grant or prescription.
3. The right of the plaintiff in such case to recover damages is not affected by the fact that the defendants gave him notice of their intention, under the provisions of an act of the General Assembly, to drain the swamp above him.
4. No error can be assigned in this Court on appeal which was not assigned in the court below, except (1) the want of jurisdiction in the court wherein the trial was had, and (2) that the complaint does not contain a sufficient cause of action.

5. The act of 1871-2, ch. 129 (reënacting ch. 78, Laws 1866-7, incorporating the Lock's Creek Canal Company), authorizes the drainage of the swamp, provides how the advantage accruing to owners of land in the swamp may be assessed, etc., but provides no compensation to any one damaged by the draining: *Held*, in an action by the owner of land below the swamp damaged by the diverting of a flow of water in a stream running from the swamp through his land, that the plaintiff is entitled to recover damages against the individual members of the corporation acting under the powers conferred in the act, as well as against the corporation itself.

6. In such case no statutory remedy has been provided for the plaintiff, and his remedy by an action for damages exists as at common law.

ACTION, for damages, commenced in Cumberland, and removed to and tried at Fall Term, 1877, of MOORE, before *Seymour, J.*

The facts are sufficiently stated by *Mr. Justice Rodman* in delivering the opinion of this Court.

The counsel for defendant requested the court to charge: (157)

1. That the plaintiff was not entitled to recover, because he is presumed to have used the water with notice that at some time the swamp would be drained; certainly he is not entitled to recover for a diversion of water which became necessary by reason of the addition of machinery erected after defendant's charter. Declined.

2. That the plaintiff is not entitled to recover, because he has failed to show twenty years uninterrupted occupation or use of the water, in himself or those under whom he claims. Declined.

3. That if the water diverted was surface water, the plaintiff is not entitled to recover. Given.

4. That plaintiff cannot recover against the individual defendants. Declined.

It is not deemed necessary to set out the instructions of his Honor, as they are not reviewed here, except as to one point, which sufficiently appears in the opinion.

Under the instructions given, the jury returned a verdict for the plaintiff. Judgment. Appeal by defendant.

J. W. Hinsdale and N. W. Ray for plaintiff.
McRae & Broadfoot for defendant.

RODMAN, J. This action was brought by the plaintiff, the owner of a mill on the outlet from a certain swamp, called Flat Swamp, to recover damages against the canal company, McKeithan, president of the company, J. M. Williams, one of the directors, and Devane, the contractor who executed the works complained of, for diverting a water-course formed by the union in or on an edge of the swamp of

Lock's Creek and Evans' Creek, the united waters of which run, as it is claimed, through the swamp, between defined banks, and with waters from other sources running through the swamp form the stream on which the plaintiff's mill is situated. The diversion, it is alleged, was (158) effected by cutting a canal from, at, or near the point where Lock's Creek and Evans' Creek enter the swamp, to a point on the Cape Fear River above the plaintiff's mill, and thus diverting a considerable part of the water, which was accustomed to flow and naturally did flow by the plaintiff's mill, from its natural and accustomed course, to the damage of the plaintiff.

The plaintiff in his complaint alleges that his mill is an ancient one, etc. But this, taken in connection with the rest of the complaint, we take to be surplusage. The plaintiff was probably induced to insert this in his complaint by amendment, by reason of some observation in the opinion of the Court when this case was before us heretofore (76 N. C., 478). But those remarks were evidently based on the idea, which was not inconsistent with the facts as they then appeared, that the plaintiff by his mill obstructed the outflow of water from the swamp, and ponded water on the lands of the defendants, a right which could be acquired only by grant or prescription. But as the case now appears, although the plaintiff says that his is an ancient mill, he does not claim any right to pond water on the land of the defendants, or to obstruct its flow from their land, or any other right by prescription. Neither he nor the defendants allege that he does so pond it, or obstruct its natural flow. The plaintiff claims only on the ground that as a riparian proprietor he has a right to use the water of a natural water-course as it flows through his lands, and had appropriated it to a lawful use before the act complained of.

The defense to this claim in substance is:

1. That there is no water-course in the legal sense of the term, that is, with well defined banks, flowing through the lands of the defendants or of those whom they represent, to the lands or mill of the plaintiffs.

2. That in the interest of agriculture they, as owners or as representing owners of land in Flat Swamp, have a right at common (159) law, or by virtue of certain acts of Assembly, to drain off from their lands the *surface water;* and that this term "surface water" includes not only the water which falls on their land in rain, but also all water which overflows the banks of the water-course (if any) flowing through their land to the mill of the plaintiff, and all which soaks or percolates through the banks of said water-course (called in the South, and perhaps elsewhere, seepage water), and that this right extends not merely to freeing the very top or surface of their land from such water, but to freeing it to a depth sufficient for the purposes of agriculture,

or greater if need be, for wells, etc., and this, although it may incidentally draw from the water-course a material quantity of water which would otherwise flow down it to the plaintiff's mill; and any damage so resulting, being rightful, is in law language "*damnum absque injuria.*"

Such, as we conceive, is the contention of fact and right between these parties.

1. Speaking generally, we take it to be clear that every proprietor of land through which a water-course flows has a right to a reasonable use of the water, whether for power to turn a mill, or for watering his stock, or irrigating his lands, etc.: *provided* he does not by his use of it materially damage any other proprietor above or below. Of course, the rights of such a proprietor would be liable to be limited by the just rights of any proprietor above or below. Taking this to be so, the complaint discloses a sufficient cause of action without reference to the question of the mill being an ancient one, liable, however, to be defeated by any sufficient defense. The jury under the instructions of the judge passed upon the material allegations of the complaint, and we are now called on to examine into the propriety of these instructions, as far as we may, according to establish rules.

2. It is admitted that the propriety of the judge's refusal to (160) give the instructions specifically asked for by the defendant is open to review here.

We are of opinion that those instructions were properly refused. Without discussing them *seriatim,* it will be sufficient to say that they are all founded on the idea that the plaintiff was bound to prove a right to use the water as he did, either by grant or prescription, or on the idea that the giving of notice by defendants, either by the charter of the canal company or otherwise, in some way impaired the right of the plaintiff over the water-course.

It has been seen that the right claimed by the plaintiff in his complaint is not claimed by virtue of any grant, but under his rights as a proprietor of both banks of the stream on which his mill is situated; and I cannot conceive of any principle on which a notice from defendants that they intended to drain the swamp could operate to diminish any right which the plaintiff previously had to the use of the water-course which might be affected by the drainage.

Probably the defendants were misled, as the plaintiff was, by the interpretation which they put on the language of the Court when the case was last here; but it does not appear that this misconception prevented them from availing themselves as far as they could of any substantial grounds of defense.

3. The counsel for the defendants have urged in this Court that the instructions of the judge were positively erroneous in several aspects;

but it does not appear that they excepted to any part of those instructions in the court below.

We believe it is the general, if not universal, practice of courts of appeal to permit no errors to be assigned before them which were not assigned in the court below, except that the court in which the trial was had had no jurisdiction of the action, and that the complaint
(161) contains no sufficient cause of action.

Our appeal is a substitute for the old writ of error, and our case stated for a bill of exceptions. The very name of this last implies that the exception to the ruling or other act of the judge must have been taken in the court below; and the older authorities hold that it must have been taken *during the trial* and *then* noted and put in form and presented to the judge for his seal—at least during the term. *Wright v. Sharp,* 1 Salk., 288. And this appears still to be the rule, where it has not been altered by statute. *Winston v. Giles,* 27 Gratt. (Va.), 530. That it has not been altered by statute in this State, but has been substantially affirmed, appears from C. C. P. (Bat. Rev., ch. 17), secs. 238-9, and from *Stout v. Woody,* 63 N. C., 37, which expressly decides the question. The reason assigned for this practice is, that it is proper to inform both the judge and the appellee of the exception while the error, if any, may perhaps be corrected. This reason applies with equal force in our present practice. It would be inconvenient if a party could apparently acquiesce in the instructions to a jury and take his chance of a verdict upon them, and for the first time in the appellate court assign errors in them. It may be that the instructions of the judge in this case were erroneous in the respects suggested by the counsel, or in others, and that the matters of defense were not properly presented to the jury; but under the settled practice of this Court, we think that we are not at liberty to inquire whether they were or not. The defendants urge that by this rule any review by this Court of the principal question of law in the case is precluded. That may be true. But the rule is not only just and reasonable in itself, but is essential to the administration of justice; it has been long acted on and ought to be well known, and this Court is not at liberty to depart from it in any case. *Stout v. Woody,* 63 N. C., 37.

(162) 4. There is one ruling of the judge, however, which was excepted to below and which we are at liberty and required to review. The defendants asked the judge to instruct the jury that the plaintiff could not recover against the individual defendants, McKeithan, J. M. Williams and Devane. This the judge refused, and in effect said that these persons were liable, if the company was.

The argument for these defendants is, that they were the agents of a corporation created for public purposes, and that they acted within the

limits of the powers lawfully given to the company by the acts respecting it, and were guilty of neither malice nor negligence.

For this proposition they cite Cooley Const. Lim., 564. Accepting for the occasion the language of Cooley as a correct expression of the law, and admitting that the corporation was created for public purposes, are the defendants within the rule? Laws 1866-7, ch. 78, incorporates these defendants and others; authorizes them to drain Flat Swamp; by section 8 it provides how the advantage to the owners of land in the swamp may be assessed, and requires such owners to pay the amount of the increased value of their lands by reason of the drainage, to the corporation; but it provides for no compensation to any one damaged by the drainage. The whole effect of that act was to authorize the company to represent the landowners in the swamp, in the present action, and in others like it. Section 8 of this act may be left out of view as unconstitutional, inasmuch as it requires each owner of land to pay for the increase in value of his land, without regard to the cost of the improvement.

No part of this act directly affected the plaintiff. By Laws 1871-2, ch. 129, the previous act is substantially reënacted, and section 5 of this last act gives to the company authority to proceed under sections from 1 to 11 of chapter 39 of Battle's Revisal, *to secure indemnity for the expense of draining the lands of nonstockholders.* Other- (163) wise, this act is not material. We may say, in passing, that it is strange that an act so liable to criticism as this is, and which has already produced so much uncertainty and litigation, and done so much to obstruct the object it was intended to forward, should be continued on the statute-book. It provides a certain procedure by which ultimately a right may be acquired to drain the lands in any swamp on paying to the owner any resulting damage. How far this act is constitutional it is unnecessary to inquire; because, if it be void, it gives the defendants no justification beyond what they would otherwise have; and if it be valid, it does not appear that its provisions were pursued in respect to the plaintiff. We are of opinion, therefore, that the ruling of the judge which we are considering was not erroneous. The doctrine assumed above as correct does not cover these defendants, who can only protect themselves as the company (which is an incorporated society of landowners in the swamp) can, under its rights at common law, which has been seen are not so presented to us that we can consider them.

5. The defendants took another exception which is open to them in this Court, to wit, that the plaintiff was confined to his statutory remedy, and could not pursue his common-law remedy by an action in the Superior Court. That has been decided to be so with respect to persons whose lands are flooded by the dam of a public gristmill, or are

taken for the purpose of a railroad company; and perhaps if any statutory remedy *which he could initiate* had been given to the plaintiff, it might be held from analogy that he was confined to it. But it will be seen that chapter 39, Bat. Revisal, gives him no remedy. By that act all the proceedings are to be begun by the company, and it is only when we come to section 10 that we find it provided that when damages are assessed to any tract of land the corporation shall not enter upon it until it has paid to the owner the damages assessed, with (164) some exceptions important in themselves, but not material in this case.

In the present case no damages have been assessed to the plaintiff, or could have been by any action of his; he has never been made a party to any proceeding for that purpose, and the corporation has not entered on his land and will never have occasion to do so. It is clear that no statutory remedy has been provided for this plaintiff, and his remedy at common law must therefore continue to exist.

PER CURIAM. No error.

Cited: S. v. Hinson, 82 N. C., 598; *Burton v. R. R.,* 84 N. C., 196; *Bryant v. Fisher,* 85 N. C., 71; *Daniel v. Pollock,* 87 N. C., 505; *Davis v. Council,* 92 N. C., 732; *Halstead v. Mullen,* 93 N. C., 254; *Manufacturing Co. v. Simmons,* 97 N. C., 90; *Harris v. R. R.,* 153 N. C., 544; *Geer v. Water Co.,* 127 N. C., 349.

STATE ON RELATION OF JAMES B. CHERRY, TREASURER, ETC., *v.* E. A. WILSON, S. R. ROSS, AND OTHERS.

Sheriff—General and Special Tax Bonds—Liability of Sureties.

Where a sheriff executed a bond for the collection of general taxes and another bond for the collection of special taxes, it was *Held*, that the surety on the first bond was liable for any defalcation in the general taxes, and also liable for a ratable share and share alike with the sureties on the special tax bond (as if he had signed the same), for any defalcation in the special taxes.

ACTION on an official bond, tried at Fall Term, 1877, of PITT, before *Cannon, J.*

The relator, as treasurer of Pitt County, brought this action against Wilson, the sheriff, and the sureties on his $10,000 bond as tax collector, alleging a failure to pay over the special taxes collected for 1876. The defendants admitted the execution of the bond, but insisted that in the

same year Wilson executed a bond in the penal sum of $21,000, with William Whitehead as surety, conditioned that he should collect the taxes for said county for said year and pay over the same, etc.; that the special tax authorized to be collected was a tax within (165) the words and meaning of the act of Assembly by virtue of which the special tax was levied; and that the bond to be given was an additional one, not liable for any default of the sheriff until the remedy upon the general bond had been exhausted, the surety to which was amply sufficient. His Honor held that the defendants were liable upon the special tax bond. Judgment. Appeal by defendants.

Jarvis & Sugg and Gilliam & Gatling for plaintiff.

W. N. H. Smith (before his appointment as Chief Justice) for defendants.

READE, J. The defendants are primarily liable upon their bond of $10,000, conditioned for the collection of special taxes; and judgment would be entered here for the penalty, to be discharged by the payment of the amount of the defalcation in not paying over the special taxes, but the defendant Wilson had given another bond of $21,000, conditioned for the collection of the general taxes, to which these defendants, other than Wilson, were not parties, but to which one Whitehead was surety. And said Whitehead is liable for the collection of the special taxes as well as for the general taxes. But he is not liable upon the special tax bond. He is, however, liable to these defendants for contribution just as if he had signed the special tax bond with them. And there is a suit now pending before us against said Whitehead upon the general tax bond, one of the objects of which suit, as it is one of the objects of this suit, is to determine the liability of the sureties upon both bonds for contribution among themselves.

Our opinion is that Whitehead is liable on the general tax bond to which he is surety for the defalcation in the general taxes, and that he is also liable on the same bond for a ratable part, share (166) and share alike, with the sureties on the special tax bond for the defalcation in the special taxes just as if he had signed the special tax bond with these defendants.

So that the result is that Whitehead is liable for all the general taxes, and he and these defendants, sureties, are liable, share and share alike, for the special taxes. And as we were informed at the bar that it was desirable to adjust the liabilities of all the sureties for contribution among themselves, the case will be remanded and this opinion certified, to the end that the amount be ascertained.

PER CURIAM. Judgment accordingly.

STATE ON RELATION OF JAMES B. CHERRY, TREASURER, ETC., *v.* E. A. WILSON AND WILLIAM WHITEHEAD.

Plaintiff—General and Special Tax Bonds—Liability of Sureties.

The surety upon the general tax bond of a sheriff is liable for all taxes collected, whether general or special; and where there is a special tax bond executed by the sheriff, the surety upon the general bond, if the entire defalcation as to the special taxes is collected out of him, is entitled to contribution, share and share alike, from the sureties on the special tax bond, as if he had signed the same.

ACTION on an official bond, tried at Fall Term, 1877, of PITT, before *Cannon, J.*

The relator, as treasurer of Pitt County, brought this action against Wilson, sheriff, and Whitehead, surety, on his $21,000 general tax bond executed in 1876, and upon the pleadings his Honor held that (167) the bond sued on was not liable for any loss in the matter of the special taxes, but was liable for the sum of $5,105.24 admitted to be due on account of the *general* taxes, and gave judgment accordingly, from so much of which as related to the defendant's liability for the collection of the special taxes the plaintiff appealed.

Jarvis & Sugg for plaintiff.
Gilliam & Gatling for defendants.

READE, J. There is error. The defendants are liable upon their bond of $21,000, which we will call the general tax bond, for all the taxes collected, whether general or special. The defendant surety, Whitehead, is therefore liable to the plaintiff not only for his principal's defalcation in not paying over the general taxes, but the special taxes as well. There should, therefore, be judgment here accordingly; but it appears that there is also a special bond for $10,000 for the collection of the special taxes, to which defendant Whitehead is not surety, but other persons are. These other persons, sureties on the $10,000 bond, are jointly liable among themselves, and the defendant Whitehead is jointly liable with them, for the defalcation of their principal in not paying over the special taxes, just as if Whitehead had signed the $10,000 bond with them.

So that if the whole defalcation for both general and special taxes be collected out of Whitehead in this suit, he would be entitled to contribution from the sureties on the $10,000 bond, in so far as the special taxes are concerned. And as another suit is pending before us on the $10,000 bond, and as we are informed at the bar that the object of the

suits was to ascertain the liabilities of the sureties among themselves, the case will be remanded and this opinion certified, as will also be in the other case and the opinion therein, to the end that there may be judgment in this case for the penalty of $21,000 against (168) the defendants, to be discharged upon the payment by these defendants of the amount of defalcation in the general taxes, and a ratable part by the defendant Whitehead with the sureties on the $10,000 special tax bond for the amount of defalcation in the payment of the special taxes, share and share alike, as if Whitehead had signed the $10,000 bond with the other sureties. But the sureties to the special tax bond shall contribute nothing towards the payment of the defalcation in the general taxes. See preceding case.

PER CURIAM. Reversed.

(169)

JOSEPH P. PRAIRIE AND OTHERS v. J. M. WORTH, PUBLIC TREASURER.

Sheriff—Official Bond—Liability of Sureties—Extension of Time for Settling Taxes.

1. The act of the General Assembly (Laws 1873-4, ch. 4) extending the time of sheriffs wherein to settle their State tax accounts, on condition that three-fourths of the taxes due shall be paid within the time required by law, did not operate to discharge the sureties upon their official bonds, whether the condition of the act was complied with or not, and whether or not such sureties had notice of the extension.
2. Nor can the plaintiffs (sureties on such bond) take any benefit under the resolution of the General Assembly of 6 February, 1874, extending time for the settlement of the one-fourth due, for the reason, among others, that the condition contained in the resolution that certain costs should be paid does not appear to have been complied with.
3. A sheriff takes office and executes his bonds subject to the power of the Legislature to control its duties as the public good may require. The power which imposes the burden of taxation can legally indulge, mitigate, or suspend the assessment and collection of its revenues; and every collecting officer accepts office and gives bond affected with notice and subject to the exercise of this right of sovereignty. It enters into and becomes a part of the contract with the State and is as binding upon the bondsmen as any express condition of the bond.

APPEAL from *Buxton, J.*, at June Special Term, 1877, of WAKE.

This action was originally brought against David A. Jenkins, Public Treasurer, and after his term of office expired, the present defendant (his successor) was made a party. The plaintiffs insisted that in consequence of the effect of the act of Assembly in extending the time for

(170) the collection of taxes, they, as sureties upon the bond of T. F. Lee, sheriff of Wake County, who had failed to pay taxes collected for a certain period, were (not having had notice of said extension) discharged from all liability in respect thereto, for that the forbearance to the principal released the surety; and they demanded judgment that the Public Treasurer be enjoined from proceeding further to enforce the execution of a judgment which had been obtained against them as sureties aforesaid in consequence of the default of their principal, and that said judgment may be declared void.

His Honor held that said judgment be vacated, and that the Public Treasurer be perpetually enjoined from collecting the same. From this ruling the defendant appealed.

J. B. Batchelor and Badger & Devereux for plaintiffs.

W. N. H. Smith (before his appointment as Chief Justice) for defendant.

BYNUM, J. This case is now before the Court upon its merits, the preliminary questions made in it having been decided when the case was formerly before us. *Prairie v. Jenkins,* 75 N. C., 545.

The plaintiffs are sureties upon the bond of the sheriff of Wake County, for the collection of the public taxes, which bond was executed to the State on 1 September, 1873, with the following conditions, to wit: "Whereas the above bounden Timothy F. Lee has been duly elected and appointed sheriff of the county of Wake, now if the said Timothy F. Lee shall well and faithfully collect, pay over, and settle the public taxes as required by law, during his continuance in the office of said sheriff, then in that case the above obligation to be void; otherwise, to be in full force and effect." By law it was the duty of the sheriff to collect the taxes and settle with the Treasurer of the State on or before the first Monday in December, 1873. He failed to do so. But on the first day of December of the same year an act of the Legislature

(171) was passed and ratified, in the words following, viz.: "That the sheriffs or other accounting officers of the several counties of this State be allowed until the first Monday in January, 1874, to settle their State tax accounts for the year 1873, with the Auditor, and pay the amount for which they are liable to the Treasurer of the State: *Provided,* that said sheriffs and other accounting officers pay in and settle three-fourths of the said taxes as now required by law, and further amount of taxes actually collected: *Provided,* that no sheriff taking benefit under the provisions of this act shall be entitled to mileage for settlement of the deferred taxes."

"That this act shall be in force from and after 17 November, 1873." Laws 1873-74, ch. 4.

The plaintiffs contend that by virtue of this statute there was such an extension of time and forbearance of suit by the State that the sureties on the bond were discharged. Before such an effect can be given to the statute it must appear that its conditions have been performed as stipulated, for an agreement based upon a condition which is uncomplied with is not binding and does not discharge those who stand in the relation of sureties, but leaves all the parties unaffected as though the act had never passed; just as an unaccepted offer is no offer at all. 2 Daniel Neg. Instr., sec. 1318. To give effect to the statute, as an extension of the time of settlement, "three-fourths of the taxes, as now required by law," were to be paid, that is, they were to be paid on or before the first Monday in December, 1873, which was the time specified by law for the settlement of the public taxes. The case states that they were not paid until the *tenth* of December. It follows that, the proposition of the State not having been accepted, it incurred no obligation of indulgence. It is no answer to say that, although the required sum was not paid at the time specified in the *proviso* of the statute, yet it was paid to and accepted by the State, a few days after, and that the acceptance was a waiver of strict performance of the (172) conditions of the act. By the nonperformance of the conditions the whole tax became due and collectible. The acceptance of a part of the debt when the whole is due cannot be construed into a waiver of the right to collect the remainder.

Nor can the sureties take any benefit under the resolutions of the Legislature, adopted on 16 February, 1874, purporting to extend the time of the settlement of the one-fourth of the overdue taxes to 1 April, 1874, for the reason that those resolutions also have a *proviso,* requiring as a condition precedent, that the sheriff should pay certain costs upon an action then pending for these taxes. The case does not show that these costs have been paid. There are other fatal objections to these resolutions operating as an extension of time to collect the taxes, for the noncollection of which a judgment had already been taken.

If the sheriff had brought himself within the *proviso* of the act of 1 December, Laws 1873-74, ch. 4, by a compliance with the conditions precedent, it does not follow that the sureties upon his bond would then have been discharged. A distinction is made between private bonds, individual and corporate, and public official bonds, given to secure the performance of continuous public duties, affecting the general welfare. The collection of public taxes must be conducted under the continuous supervision and control of the legislative branch of the Government. The laws affecting the assessment and collection of the public revenues must be from time to time made more or less rigorous in their enforcement, or otherwise modified to conform to the existing condition of the

country, the depression of trade, the failure of crops, the scarcity of money and other causes, often delicate and complex, as affecting the sensitive subject of taxation. The power which imposes the burden of taxation is the sole power that can legally indulge, mitigate, or
(173) suspend the assessment and collection of the revenues. Every collecting officer, therefore, accepts office and gives bond affected with notice and subject to the exercise of this right of sovereignty. It enters into and becomes a part of the contract with the State, and is as binding upon the bondsmen as any express condition of the bond. The sheriff took the office and executed the bond, subject to the power of the Legislature to control its duties, as the public good might require. *Bunting v. Gales,* 77 N. C., 283; *Hoke v. Henderson,* 15 N. C., 1; *Head v. University,* 19 Wall., 526; *Cotten v. Ellis,* 52 N. C., 545; Cooley on Taxation, 502; *S. v. Carleton,* 1 Gill. (Md.), 249-57; *Bennett v. Auditor,* 2 W. Va., 441.

It can admit of no doubt that in passing the act relied on by the plaintiffs, the Legislature never intended to release the sureties on the bonds of every sheriff in the State; for the act applies to all. It is equally evident that the sureties did not believe they had been released, and that in this case it was an afterthought; for not only was judgment taken on the bond in January, 1874, and an execution thereon issued in May following, which was levied on all the property of the sureties, real and personal, but in fact $4,000 had been paid or collected under the execution, from whom is not stated. In December, 1874, another execution was issued to collect the remainder of the judgment, and again levied on the property of the sureties, which was advertised for sale; and it was not until 29 March, 1875, that they awoke to the belief that they had been discharged as sureties, as long back as 1873. If this proceeding had been a motion to vacate the judgment in the proper court, after that delay and under such circumstances, we presume that the court below would not have granted it.

We do not decide that the plaintiffs should not have sought relief by a motion in the cause, which in general is the appropriate
(174) remedy; because it is the interest of the State and desire of the parties that the case should be disposed of upon the merits. The plaintiffs, therefore, *pro hac vice* can have the benefit of the jurisdiction, and as they have no merits, the action will be dismissed.

PER CURIAM. Action dismissed.

Cited: Worth v. Cox, 89 N. C., 47, 51; *Daniel v. Grizzard,* 117 N. C., 110; *Wilson v. Jordan,* 124 N. C., 709; *Greene v. Owen,* 125 N. C., 215.

STATE ON RELATION OF ISAAC JACKSON AND OTHERS v. W. Q. MAULTSBY AND OTHERS.

Superior Court Clerk—Action on Sheriff's Bond for Recovery of Costs.

An action can be maintained by the clerk of a Superior Court in his own name upon the official bond of the sheriff, for the recovery of costs accrued in such court and collected by the sheriff, and due and payable to said clerk *and others*.

ACTION upon an official bond, tried at Fall Term, 1877, of COLUMBUS, before *Moore, J.*

This action was brought by Isaac Jackson, former clerk of the Superior Court of Columbus County, against W. Q. Maultsby, former sheriff of said county, and the sureties on his official bond, to recover certain costs due the plaintiff and sundry other persons who were witnesses in various suits, and the sheriff who preceded the defendant in said office. Upon the hearing, his Honor being of opinion that the clerk could only recover the costs due him, and that all the other parties entitled to costs as set out in the complaint must bring their separate actions to recover the same, gave judgment for the plaintiff Jackson, and refused to give judgment for the costs due the witnesses, etc. From this (175) ruling the plaintiffs appealed.

Battle & Mordecai for plaintiffs.
A. T. & J. London for defendants.

BYNUM, J. The conditions of the sheriff's bond are: "That he shall well and truly execute and due return make of all process and precepts to him directed, and pay and satisfy all fees and sums of money by him received or levied by virtue of any process, into the proper office into which the same by the tenor thereof ought to be paid, or to the person or persons to whom the same shall be due," etc.

The sheriff collected the moneys due upon the executions, but failed to pay over to the witnesses and other parties entitled, or to the clerk of the court to whom the moneys were payable by the conditions of the bond. This was a breach which made the sheriff liable to an action, and the question is, whether the clerk can maintain the action, as well for the beneficiaries under the executions as for himself. If the sheriff does not pay it to the parties themselves, the law requires that all sums collected on executions shall be paid into the clerk's office, and it is made the clerk's duty to disburse the money to the persons entitled. Hence, witnesses and others do not look to the sheriff, but to the clerk, for their fees. It is far less expensive and more convenient, both to

the sheriff and suitors, witnesses and others, that one person in behalf of all should by a single action upon the bond recover what is due to many, than that a several action should be brought by a host of witnesses, each suing for himself. These costs are generally due to very many persons, in small sums, ranging from less than a dollar to a few dollars, but amounting in the aggregate, as here, to a large sum. If these parties, generally poor persons, were compelled each to bring an action against the sheriff, it is very obvious that he would (176) seldom be sued, and would be permitted to pocket large sums with impunity. The present case affords an apt illustration. But for this action by the clerk, the sheriff would probably never be called to an account. It is true, the clerk here is only entitled in his own right to a part of the sum sued for, but by the terms of the bond in suit, and by the provisions of law, he is legally entitled to the possession of the whole. The action is in behalf of the others, who are all named in the complaint, as the persons in whose behalf he sues. There are analogous precedents. In *Clerk's Office v. Allen,* 52 N. C., 156, the plaintiff was ordered to pay certain costs of witnesses and fees of sheriff and clerk. It was held that an action could be maintained in the name of the clerk's office against the party liable. So in *Officers v. Taylor,* 12 N. C., 99; *Merritt v. Merritt,* 2 N. C., 20; *Superior Court Office v. Lockman,* 12 N. C., 146. In these cases it was held that the name of the clerk's office, as plaintiff, was a mere formality, the substance being that the costs and fees due the officers and witnesses should be collected in the most speedy and inexpensive way. It is true that by the provisions of law, Bat. Rev., ch. 80, secs. 10, 11, suit may be brought upon the bond by any party injured, and that any of the parties for whose benefit this action was instituted by the clerk could have maintained the action; but this one action for the benefit of all is so much the more convenient and proper that the Court would be reluctant to interpose against it any mere technical objections. When we look at the complaint, however, the action is in substance "the State upon the relation of Jackson and others against Maultsby and others," and is in conformity to law.

PER CURIAM. Reversed.

Cited: Perkins v. Berry, 103 N. C., 143; *Burrell v. Hughes,* 116 N. C., 437.

(177)

CITY OF WILMINGTON v. HENRY NUTT.

Clerk of New Hanover Superior Court—Official Bond—Action by City of Wilmington to Recover Taxes Collected Under Private Laws 1870-71, Ch. 6.

The sureties on the official bond of a clerk of the Superior Court of New Hanover County, executed and conditioned according to the provisions of C. C. P., sec. 137, are liable in an action by the city of Wilmington to recover taxes collected by the clerk upon inspectors' licenses, under chapter 6, Private Laws 1870-1, although the bond was executed prior to the passage of the act.

CIVIL ACTION upon an official bond, tried at June Special Term, 1877, of NEW HANOVER, before *Seymour, J.*

This action was brought against the defendant, who was one of the sureties on an official bond of James C. Mann as clerk of the Superior Court, conditioned for the faithful performance of his duties, etc. It was alleged, among other things, that said Mann as clerk aforesaid had failed to pay to plaintiff the amount of certain taxes on inspectors' licenses which he had collected for the plaintiff in pursuance of Private Laws of 1870-71, ch. 6, and judgment was demanded for the amount of said bond, to be discharged upon payment of the sums received for the said licenses.

The defendant demurred to the complaint and assigned as cause: (1) that according to the true intent and meaning of said private act, the said Mann was thereby declared and appointed to be a fiscal agent of the plaintiff, and the duty of receiving and paying over to the city treasurer said license taxes was imposed upon him as such fiscal agent, and not as a part of his official duty as clerk of the Superior Court of New Hanover County; nor did the money arising therefrom come into his hands by virtue or color of his office as clerk aforesaid; and (2) that according to the true intent and meaning of the bond sued upon and the condition thereof, this defendant cannot be held (178) liable for the default of James C. Mann, the clerk, in not paying over to the plaintiff the moneys received by him for the licenses aforesaid; which moneys, as appears on the face of the complaint, were received by him under a private statute which was passed and ratified more than fifteen months after the execution of the said bond.

His Honor sustained the demurrer. Judgment for defendant. Appeal by plaintiff.

D. L. Russell for plaintiff.
A. T. & J. London for defendant.

FAIRCLOTH, J. By statute, Rev. Code, ch. 19, sec. 8, the bond of the Superior Court clerks was conditioned "for the safe keeping of the records of their respective courts, for the due collection, accounting for, and paying all moneys which may come into their hands by virtue of their office, and for the faithful discharge of the duties of their office in all respects whatsoever." Under this and similar provisions in official bonds, the officer has been held by repeated decisions responsible, not only for those duties particularly specified in the condition, but for such duties as have relation to and naturally connect themselves with the office. If new duties are imposed, they attach to the office at once, and he becomes liable for their proper performance, and the liabilities of the sureties will be measured by the terms of their undertaking, which will be construed to include, not only express duties of their principal, but those naturally implied and connected with his office. The contract and considerations of public policy both are considered in fixing the responsibility of public officials and their bondsmen, in the application of which principles it has been held that clerks of (179) the court are responsible as insurers for moneys received by virtue of their office, as well as the other ordinary duties, and that nothing but payment will discharge them and their sureties. *Commissioners v. Clarke,* 73 N. C., 255; *Havens v. Lathene,* 75 N. C., 505. From this class is distinguished the liability of an officer on a private contract, as the treasurer of a railroad company, who is held liable only by the express terms of his undertaking, as the custodian of moneys received by him and for due diligence. *R. R. v. Cowles,* 69 N. C., 59. Such are the rules governing the liability on obligations conditioned as the above.

The act of 1868, C. C. P., sec. 137, requires a clerk of the Superior Court to enter into bond, conditioned "to account for and pay over, according to law, all moneys and effects which have come or may come into his hands by virtue or color of his office, and shall diligently preserve and take care of all books, records, papers, and property which have or may come into his possession by virtue or color of his office, and shall in all things faithfully perform the duties of his office as they are *or thereafter shall be prescribed by law.*"

The clerk executed his bond with the defendant as one of his sureties, conditioned as follows: "To account for and pay over, according to law, all moneys and effects which have come or may come into his hands by virtue or color of his office, and shall diligently preserve and take care of all books, records, papers, and property which have come or may come into his possession by virtue or color of his office, and shall in all things faithfully perform the duties of his office as they are or shall *hereafter be prescribed by law,*" dated 31 August, 1869.

On 21 December, 1870, the Legislature, Private Laws 1870-71, ch. 6, imposed on the clerk of the Superior Court of New Hanover the duty of issuing an inspector's license to any competent person, for the city of Wilmington, who shall first file with the said clerk a good (180) bond and pay the license tax. The clerk is further required to keep said bond as a part of the records of his office and to pay over to the treasurer of the city of Wilmington for the use of said city, within thirty days, the amount so received for any such license. It is for the nonpayment of such amount that this action is brought on said clerk's official bond. The defendant says this default is not covered by his undertaking. This question must be decided from the contract of the defendant and such considerations of public policy as are applicable, and from the true intent and meaning of the parties at the time the undertaking was entered into. We were referred to no authorities, and we have found none directly in point. The defendant's counsel cited *Eaton v. Kelly,* 72 N. C., 110, and *Holt v. McLean,* 75 N. C., 347, but they do not fit this case. In each one the undertaking was conditioned as prescribed in the Rev. Code, prior to the act of 1868, and so are all the cases we have examined. In the case of *Cameron v. Campbell,* 10 N. C., 285, the conclusion of the condition was, "and in *all things comply* with the acts of the General Assembly in such case made and provided." The duty required was one imposed on the officer by the act of Assembly—prior, however, to the date of the undertaking in the bond; but *Henderson, J.,* said if the law had been passed afterwards, he wished to be understood as expressing *no* opinion (the word *an* in the printed report being a clerical error). Looking, then, at the plain and broad terms of the contract alone, we think the defendant is liable. We can give no other meaning to it. The Legislature manifestly intended to provide for a case like the present, and the defendant by conforming his bond to the strict language of the act of the Legislature, must have understood it, and intended the same thing. If such was not his intention, then by inserting the last clause in the condition of his bond he was engaged in doing a vain and useless thing, because the other conditions were amply sufficient to embrace all the duties (181) of the clerk then required by law.

PER CURIAM. Reversed.

Cited: Wilmington v. Nutt, 80 N. C., 265; *Presson v. Boone,* 108 N. C., 84.

STATE ON RELATION OF THE COMMISSIONERS OF WAKE COUNTY v. ALBERT MAGNIN AND OTHERS.

County Treasurer—Action on Official Bond by County Commissioners—School Fund—Sufficiency of Complaint—Appeal from Order Overruling Demurrer.

1. An action upon the official bond of a county treasurer (conditioned that he as treasurer and disburser of the school fund should well and truly disburse, etc.) for the recovery of money belonging to the school fund of the county collected by him and not paid over, is properly brought in the name of the board of commissioners of the county.
2. In such action, where the complaint alleged that "the said treasurer accounted with the plaintiffs concerning moneys which had come into his hands as said treasurer, and on such accounting was found to be in arrears and indebted to said county in the sum," etc., but failed to allege that any of the school fund or money ever came into the defendant's hands: *Held*, to be demurrable.
3. An appeal lies to this Court from an order of the court below overruling a demurrer.

ACTION, tried at Fall Term, 1877, of WAKE, before *McKoy, J.*

This was an action on the bond of defendant Magnin, in which it was alleged that he was duly elected and appointed treasurer of Wake County on 9 September, 1873, and that on 19th of said month (182) said Magnin and the other defendants, his sureties, executed their bond payable to the State in the penal sum of $40,000, conditioned that said Magnin as treasurer of said county and disburser of school money should well and truly disburse the money which came into his hands as the law required. It was further alleged that in 1874 the said treasurer, in accounting with the plaintiff for the money which he had received as such, was found in arrears, and indebted to said county in the sum of $2,613.70, which he had failed to pay over according to law, and judgment was demanded for the same, and interest.

The defendants demurred to the complaint, and said that it did not state facts sufficient to constitute a cause of action, in this, that it appeared upon the face of the complaint that the said board of commissioners, if the cause of action therein exists at all, were not the proper relators to institute this action, but that the county treasurer of said county should have been the relator therein; and that it is not alleged that the moneys, which it is alleged therein were collected by said Magnin as treasurer, and which it is therein further averred that he failed to pay, were collected by him under and by virtue of his appointment to said office for the same term of said office for which the bond declared on was conditioned that the said Magnin should, during his

continuance in office as treasurer of Wake County, well and faithfully execute the duties thereof and pay according to law, etc.

His Honor overruled the demurrer. The defendants excepted and asked that a notice of appeal be entered, which the court refused, but permitted the defendants to answer upon the condition that a copy of the answer should be furnished the plaintiff twenty days before the next term of the court. From which ruling the defendants appealed.

T. R. Purnell and T. P. Devereux for plaintiff. (183)
Walter Clark, A. W. Tourgee, E. G. Haywood, D. G. Fowle, and A. M. Lewis for defendant Magnin and his sureties.

READE, J. Battle's Revisal, ch. 27, sec. 31, title, *Counties and County Commissioners,* makes it the duty of the commissioners to induct into office all of the county officers and to take their bonds. Chapter 30, sec. 9, title, *County Treasurer,* makes it the duty of the commissioners to sue on such bonds when the county treasurer shall report to them a breach. Section 5 makes it the duty of the commissioners to sue the county treasurer for a breach of his bond. Chapter 80, sec. 10, title, *Official Bonds,* gives a right of action to any person injured. In chapter 102, sec. 41, title, *Revenue,* the right of action against a sheriff is given to the county treasurer, and if he refuse, to the county commissioners.

It is to be regretted that our statutes have left such an important matter so much at sea. The bond sued on is exceptional. It is treated as if it were the bond of the county treasurer, conditioned for his duties as county treasurer. But that is not *precisely* so. It is entirely distinct from the county treasurer's general bond, and is not provided for under the chapter entitled "County Treasurer," which provides for his general bond and prescribes his duties. It is provided for in chapter 68, secs. 32, 34, title, *Literary Fund,* as follows: "The county commissioners of each county shall constitute a board of education for the county . . . the county treasurer shall be the treasurer of the county board of education . . . but before entering upon the duties of his office he shall execute a bond with sufficient surety . . . for the faithful performance of his duties as *treasurer of the county board of education.*" And then it is made his duty to receive and disburse the school fund of the county; and in this he is sometimes styled the county treasurer, and sometimes the treasurer of the county board of educa- (184) tion; and no special provision is made for a suit upon his bond for the school fund; and so we must suppose it must fall under the provisions for suits on the general bond of the county treasurer by the county commissioners.

The bond sued on in this case is for the *school fund;* and we are of the opinion that *ex necessitate* the county commissioners must have the

right to sue. To confine the right to his successor in office would be impracticable, for in many cases he would be his own successor.

The objection that if the commissioners sue they must receive the money, and they are not bonded officers and might waste it, may be obviated by having the recovery paid in and disbursed under the direction of the court.

The first ground of demurrer, that the commissioners are not proper parties, is overruled.

We have already said that this suit is upon the bond for the school fund. But there is no allegation in the complaint that any of the school fund or money ever came into the defendant's hands. It is only charged that "the said treasurer accounted with the plaintiffs concerning moneys which had come into his hands as said treasurer, and on such accounting was found to be in arrears and indebted to the said county of Wake in the sum," etc. There is, therefore, no breach assigned for receiving and not disbursing the school money, which is the only duty covered by the bond. For this defect in the complaint, the second specification for demurrer is allowed.

The other grounds for demurrer are overruled. There is error. There will be judgment here sustaining the demurrer in the particular named above, and judgment that the defendant recover his costs and go without day.

It is objected by the plaintiff that the order below overruling the demurrer was not appealable, because it was not a *final* judgment, nor did it affect *substantial rights*. C. C. P., sec. 299.

(185) We have, however, over and over again entertained appeals from such orders, and although it may admit of doubt whether The Code would not bear a different construction, yet it is a matter of practice which experience can best test, and if found to be inconvenient, it can be easily altered by legislation, or, possibly, by a rule of this Court. But it ought not to be left at sea to wreck legal navigation; and therefore we decide that the order was appealable. In this case it works well, because it puts an end to the action and saves the expense and trouble of a trial, which could have availed nothing. But in a kindred case between the same parties at this term where the demurrer is overruled, it had not the same advantage; for the case has to go down for an answer and trial. Yet even in that case the decision of this Court upon the demurrer may be, and we suppose will be, decisive of the case upon its merits.

Judgment reversed, and judgment here for defendants.

PER CURIAM. Reversed.

Cited: Comrs. v. Magnin, post, 187; *Sutton v. Schonwald,* 80 N. C., 23; *Clifton v. Wynne, ib.,* 152; *S. v. McDowell,* 84 N. C., 802; *Commissioners v. Magnin,* 86 N. C., 287; *Wescott v. Thees,* 89 N. C., 58; *Ramsay v. R. R.,* 91 N. C., 419; *Clements v. Foster,* 99 N. C., 257; *Pender v. Mallett,* 122 N. C., 164; *Shelby v. R. R.,* 147 N. C., 538.

(186)

STATE ON RELATION OF THE COMMISSIONERS OF WAKE COUNTY v. ALBERT MAGNIN AND OTHERS.

County Treasurer—Action on Official Bond by County Commissioners—Sufficiency of Complaint.

1. An action upon the official bond of a county treasurer for the recovery of money due the county, collected by him and not paid over, is properly brought in the name of the board of commissioners of the county.
2. In such action, where the complaint alleged the execution of the bond and that the defendant collected the money as treasurer, etc., and there was no allegation that the defendant was treasurer at any time not covered by the bond: *Held,* that the complaint substantially alleged that the money was collected during the term covered by the bond, and was sufficient.

CIVIL ACTION, tried at Fall Term, 1877, of WAKE, before *McKoy, J.*

This was an action on the bond of the defendant Magnin as treasurer of Wake County, in which the plaintiff alleged the execution of the bond in the penal sum of $52,000, conditioned that the said Magnin during his continuance in office shall faithfully execute the duties thereof, pay out all moneys which may come into his hands, and render a true account of the same when required by law. It was further alleged that Magnin as treasurer aforesaid had collected $1,111.36 and had failed to pay over the same as required by law.

The defendants demurred to the complaint and assigned as cause: (1) that the board of commissioners were not the proper relators to institute this action, and that the county treasurer should have been the relator; and (2) that it is not alleged that the money which was collected by Magnin as treasurer of Wake County, and which it was averred that he failed to pay to the relators, was so collected by him by virtue of his appointment to said office for the same term of said office (187) for which the bond declared on was conditioned that said Magnin should faithfully execute, etc.

His Honor overruled the demurrer, and the defendants appealed.

Same counsel as in preceding case.

READE, J. The first ground for demurrer, that the county commissioners are not the proper relators, was overruled, for the reason stated in a case between the same parties at this term, *ante,* 181.

The second ground for demurrer, that it is not alleged in the complaint that the money was collected during the term covered by the bond, was overruled, for the reason that it is so alleged substantially. It is not alleged that he was county treasurer at any time not covered by the bond, and it is alleged that he collected the money "as treasurer." The defendants may answer over, if so advised.

PER CURIAM. Affirmed.

Cited: Comrs. v. Magnin, 85 N. C., 115; *Wescott v. Thees,* 89 N. C., 58.

(188)

NATHANIEL HANNER AND ANOTHER v. THE GREENSBORO BUILDING AND LOAN ASSOCIATION.

Building and Loan Association—Construction of Mortgage.

Under a mortgage executed to a building and loan association by a stockholder to secure a loan of money, it was *Held,* that only the *actual* amount loaned and interest thereon and such sum as had been paid by the association for insurance was collectible; and in such case the mortgagor was entitled to be credited with the actual amount paid by him as installments.

APPEAL from *Buxton, J.,* at December Special Term, 1877, of GUILFORD.

This action was brought by the plaintiffs against the defendants, Madison Graves and the Building and Loan Association of Greensboro, for a specific performance of a contract of sale by said Graves of an undivided half of certain real estate, the other half having been mortgaged by him to defendant association to secure a loan of $500. The plaintiffs asked for a sale of the whole of the land and a division of the proceeds between the parties entitled. Nelly Graves, claiming to be the vendee of Madison's interest in the half mortgaged as aforesaid, was made a party defendant, and pending the action she contracted to sell the same to one Hugh Wilson. Thereupon the plaintiffs, no longer desiring a sale, agreed with Wilson to hold and use the same as partnership property. Wilson then filed a petition in the cause (to relieve said half from said mortgage), in which he alleged that said association held a mortgage upon his interest in said land to the amount of $500, and

that Nelly Graves had executed to him a bond for title to said land, he agreeing to pay $1,800 therefor, $900 of which had been paid, and the balance payable in installments; and he asked to be made a party plaintiff, and that the amount due upon the mortgage may be ascertained and paid under the order of the court, so as to enable him and said plaintiffs to perfect their agreement to operate the mills (189) on said premises as partners, and to get a title for his part of the land bought as aforesaid. The prayer of this petition was allowed and the case referred; and in the statement set out in the report of the referee it was found that the amount of the several encumbrances on the land was $325.56, as follows:

To	amount	mortgage to association	$500.00	
"	"	paid insurance on building	12.00	
"	"	decree in favor of D. & D.	100.00	
By	"	installments paid association by Nellie Graves		$248.00
"	"	interest on same		38.44
"	"	to balance		325.56
			$612.00	$612.00

The defendant association, claiming a greater amount as being due them, excepted to the report, and insisted that the sum due them under their regulations on account of the transactions had with Madison Graves, who had been an owner of stock therein, was $365.56, as follows:

To	amount	of loan	$500.00	
"	"	difference on shares	140.00	
"	"	paid for insurance	12.00	
By	"	installments paid		$248.00
"	"	interest on same		38.44
"	"	to balance		365.56
			$652.00	$652.00

The $140 as stated was claimed as the difference between the amount at which Graves' shares were sold ($500) and their present value under the regulations of the association ($640), being $35 on each share. The exceptions were overruled, and it was ordered that the report be confirmed. From this ruling the defendant association appealed.

No counsel for plaintiffs. (190)
Scott & Caldwell for defendant Association.
J. T. Morehead for defendant Graves.

READE, J. The report of the referee gives to the defendant association the amount of money loaned, $500, and interest thereon, and the amount expended for insurance, deducting only what was actually paid as installments. We do not think this is subject to any exception.

A point was made in the argument as to the status of Madison Graves in the association, and the terms of his reinstatement. That is not involved in the report and exceptions, and therefore we do not consider it.

There is no error in the report, or in the order confirming it. This will be certified, to the end that there may be the proper orders for the satisfaction of the mortgage and for the title to the purchaser, etc.

PER CURIAM. Affirmed.

Cited: Hoskins v. B. & L. Association, 84 N. C., 838.

---

(191)

SOLOMON C. PHILLIPS AND OTHERS v. MOSES L. HOLMES.

Mortgage Deed—Construction of Covenant.

1. Where a mortgage deed contained a covenant on the part of the mortgagee to allow to the mortgagor in case of foreclosure such sum as he might expend in permanent improvements on the land, "but the same is not to be paid until the mortgage debt with interest has been fully paid and satisfied," and the land upon a sale under foreclosure did not bring a sufficient sum to pay off the mortgage debt: *Held*, in an action by the mortgagor against the mortgagee to recover for improvements, that the plaintiff was not entitled to recover.

2. Where in such action the jury found that it was not intended that a clause should be inserted in the mortgage deed that the plaintiff should only be reimbursed for improvements after payment of the mortgage debt, but did not find that a provision for reimbursing him out of any fund, or that the defendant should become personally liable, was intended to be inserted and was omitted by mistake: it was *Held*, that the deed must be taken as expressing in its terms the true meaning of those who executed it.

ACTION for breach of covenant, tried at Fall Term, 1877, of CARTERET, before *Moore, J.*

The facts are sufficiently set out by the *Chief Justice* in delivering the opinion of this Court. Judgment for plaintiffs. Appeal by defendant.

Green & Stevenson for plaintiffs.
A. G. Hubbard for defendant.

SMITH, C. J. On 6 January, 1870, A. J. Phillips and wife, Anna, J. D. Phillips and wife, Julia, and S. E. Phillips and wife, Nancy, conveyed a tract of land to the defendant in trust to secure and provide for the payment of a note of $1,670, of the same date, executed to the defendant by the said A. J. Phillips, principal, and John I. (192) Shaver and William Smithdeal, sureties. The note was payable on 1 January, 1871, and bore interest at the rate of 8 per cent per annum. The deed contained a condition making it void if the note was paid at maturity, with a power of sale if it was not so paid. The defendant also executed the deed, and therein in one of its clauses covenanted as follows: "And the said Moses L. Holmes covenants to and with the said A. J. Phillips that in the event of a failure on the part of the said A. J. Phillips to pay the aforesaid debt as hereinbefore specified, whereby a right to foreclose this mortgage will accrue to the said Holmes, he will allow as a credit to said Phillips such sums of money as the said Phillips has actually expended in permanent improvements on said lot; but the same *is not to be paid until the aforesaid debt, with interest as aforesaid, has been first fully paid and satisfied,* such sums so to be allowed not to exceed the sum of $500."

The mortgage deed was drawn at the instance of A. J. Phillips by his attorney. The sureties to the note were solvent. The land conveyed by the mortgage has been sold by the defendant, and the proceeds failed by a considerable sum to pay off the mortgage debt.

A. J. Phillips has expended in making improvements the sum of $350, and has since died. The action is brought by the plaintiffs as surviving partners of the firm of Phillips & Brothers, of which the deceased was also a member, upon the covenant contained in the deed.

The plaintiffs in their complaint say that the covenant imposes a personal obligation on the defendant to refund the sum expended on the premises, whether the fund arising from the sale was sufficient to pay the secured debt or not.

The answer denies this effect to the covenant, and insists if it is to be construed as claimed by the plaintiff, the deed is erroneously drawn under a mistake of both parties as to its meaning, and prays that it may be reformed.

The following issues were submitted to the jury:

1. Was it intended and agreed by and between A. J. Phillips (193) and Moses L. Holmes that the covenant in the mortgage should provide and stipulate that A. J. Phillips should be paid for the permanent improvements he might make on the house and lot *only* out of the surplus of the proceeds of the sale thereof that might remain after the mortgage debt of M. L. Holmes, and interest, should be paid?

2. Did A. J. Phillips instruct W. H. Bailey so to draw the said covenant?

3. Did W. H. Bailey fail by mistake to draw said covenant according to said instructions?

4. Did A. J. Phillips make any permanent improvements on said house and lot?

The jury responded to the first three interrogatives in the negative, and to the last in the affirmative.

The verdict of the jury declares in substance that the mortgage is drawn as the parties meant and understood, and in conformity to the directions given the attorney. The verdict, responding to the first issue, further says it was not intended that a clause should be inserted in the mortgage to the effect that Phillips should only be reimbursed his moneys spent in improvements out of the surplus, if any, produced by a sale of the property, after payment of the defendant's debt; but it does not say affirmatively that a provision for reimbursing him out of any other fund, or that defendant should become personally liable, was intended to be inserted and has been omitted by mistake. No such restriction as that described in the issues is found in the deed, and as none ought to be there, we must take the deed as expressing in its terms the true meaning of those who executed it.

The defendant asks that it be reformed if (which he denies) it imposes on him any personal liability as claimed by the plaintiff.

(194) There is no ground upon which any correction can be made, as there are no facts ascertained to warrant such correction, and in this case none is necessary.

The proper construction of the covenant is, in our opinion, free from all reasonable doubt. This will sufficiently appear by reference to its terms.

The defendant agrees in case of a sale of the land under the power conveyed in the mortgage to allow Phillips a credit for "such sum of money as the said Phillips has actually expended in permanent improvements, not exceeding the prescribed limit of $500," but this money is not to be paid him "until the aforesaid debt, with interest as aforesaid, has been first fully paid and satisfied."

The defendant does not covenant to pay for improvements out of his own means, whether the fund arising from a sale of the improved lot turns out to be sufficient or fails to pay the secured debt, but to pay after his own note is satisfied, and, most obviously, out of the surplus of the fund. The stipulation seems to have been introduced (and such is its effect) to prevent the mortgagee from delivering over the surplus to the several bargainors, as he would otherwise be by law required to do, until the money spent in improving the common property had been returned to him who used it.

The defendant as trustee agrees thus to apply the surplus, and to do

no more. As the proceeds of sale are not enough to pay the debt, the defendant has not violated his covenant, and no cause of action exists against him.

It might admit of question whether the action should not have been brought by the personal representative of A. J. Phillips, instead of by the plaintiffs, but as we hold that for the alleged breach of covenant no action can be maintained against the defendant by any one, we forbear as unnecessary to express any opinion, and allude to (195) this matter only to avoid misconception.

There is error, and the defendant is entitled to judgment that he go without day and recover his costs.

PER CURIAM. Reversed.

(196)

W. G. JOYNER v. GRAY FARMER.

Mortgage Sale—Purchase by Mortgagee—Ratification by Mortgagor—Estoppel.

1. The estate acquired by a mortgagee by a purchase at a sale made by himself under a power in the mortgage deed is not void, but only voidable, and can be avoided only by the mortgagor or his heirs or assigns.
2. In such case the estate of the mortgagee, being voidable only, may be confirmed by any of the means by which an owner of a right of action in equity may part with it, viz.: (1) By a release under seal. (2) By such conduct as would make his assertion of his right fraudulent against the mortgagee, or against third persons, and which would therefore operate as an estoppel against its assertion. (3) By long acquiescence after full knowledge.
3. Where the defendant (mortgagee) purchased the land in dispute through an agent at a sale made by himself under a power in the mortgage deed, the plaintiff (mortgagor) being present and not objecting, and thereafter the plaintiff by agreement retained possession of the land as tenant of defendant, until certain crops were gathered, when they met by agreement and adjusted the matter, the plaintiff receiving the excess of the amount of sale over the sum due the defendant on the mortgage, less a certain sum allowed the defendant as rent, and yielded possession of the premises to defendant: it was *Held*, in an action by plaintiff (brought soon after the above settlement) to set aside the sale, etc., that the sale should be set aside, the land resold under the directions of the court, and the proceeds applied to the payment of such amount as should upon an adjustment of accounts be found due the defendant, and the surplus paid to plaintiff.

APPEAL from *McKoy, J.*, at Fall Term, 1877, of NASH.

The plaintiff, mortgagor, brought this action against the defendant, mortgagee, for the purpose of setting aside a sale of certain lands

(197) made by the mortgagee on 20 June, 1873, under a power of sale in the deed, and at which sale the mortgagee, through an agent, became the purchaser. The plaintiff failed to pay at maturity, and by agreement between the parties a portion of the mortgaged premises was sold by the plaintiff and the proceeds credited on the debt; and then, after a further failure to pay, the defendant sold the balance of the land, as aforesaid, to secure payment of the balance of the debt. Due notice was given of the time of sale by advertisement at the courthouse door, and the plaintiff was present and did not object thereto. The land was bid off by one Eason at a sum considerably in excess of the debt, and the mortgagee conveyed to Eason, and afterwards, on the same day, Eason reconveyed to the defendant mortgagee. By agreement, the plaintiff mortgagor retained possession until certain crops were gathered, when they met by agreement in the town of Nashville to adjust the matter, and the plaintiff received the said excess, first deducting $300 for rent, and yielded possession of the premises.

His Honor intimated that the differences might be more easily adjusted by an account taken by a commissioner to be appointed by the court, as there was but one issue, the amount of indebtedness of plaintiff to defendant. But the defendant insisted that the acts of the plaintiff after the sale were a ratification of the sale, and operated as an estoppel to his right to recover in this action; while the plaintiff insisted that the sale was void, and that there could be no ratification by parol.

His Honor adjudged that the sale and the deeds aforesaid did not change the relation of mortgagor and mortgagee, and ordered that the balance due to defendant be ascertained by a commissioner, who was also directed to sell the land for cash upon giving twenty days notice, execute a deed to the purchaser, and apply the proceeds to the (198) payment of the balance found to be due defendant upon the mortgage debt, and pay over the surplus, if any, to the plaintiff and report his proceedings to the next term of said court. From this judgment the defendant appealed.

Busbee & Busbee for plaintiff.
Gilliam & Gatling for defendant.

RODMAN, J. It is not doubted that a mortgage of land with a power of sale in the mortgagee upon default in payment is lawful; and if the mortgagee sell under such a power, a stranger who purchases *bona fide* will acquire a good title free of the trust. Coot on Mortgages, 125, Note A, 130; *Paschal v. Harris,* 74 N. C., 335. It is equally clear in this State, and generally, but not universally, that if the mortgagee himself purchase at his sale, whether he does it directly or by an agent, he

nevertheless holds the legal estate subject to an equity in the mortgagor to redeem, unless in some way he releases or loses that equity. 2 Washburn Real Property, 448.

In Massachusetts it appears to be established that if the mortgage contains a provision authorizing the mortgagee to purchase at his own sale, he may do so, if his proceedings are fair and honest. 14 Allen (Mass.), 369; *Hall v. Bliss,* 118 Mass., 554. It may be that the language of the opinion in *Whitehead v. Hellen,* 76 N. C., 99, is somewhat too strong to be universally applicable, for the deed from the mortgagee to his agent conveys the full legal estate to the latter, and in a court of law makes him the owner, thus divesting the mortgagor of his equity of redemption, which is considered even after forfeiture as an estate, although enforcible only in equity, and liable to sale under execution by the act of 1812, Bat. Rev., ch. 44, sec. 5, and turning the equitable estate into a mere right of action, which could not be sold under that act. But as between the mortgagor and mortgagee, the right of the former in equity after such a sale cannot be held to differ essentially from what they were before, unless they have been lost in (199) some of the ways presently to be mentioned.

The sale by the mortgagee is not void, but only voidable, and can be avoided only by the mortgagor or his heirs or assigns. Washburn, *ante.* The estate of the mortgagee acquired by the sale, being voidable only, may be confirmed by any of the means by which an owner of a right of action in equity may part with it:

1. By a release under seal, as to which nothing need be said.

2. Such conduct as would make his assertion of his right fraudulent against the mortgagee, or against third persons, and which would, therefore, operate as an estoppel against its assertion.

3. Long acquiescence after full knowledge; and probably this method may be classed with the second, unless it has continued for so long a time that a statute of limitations operates, or there is a presumption of a release. Washburn, *ante;* 8 Rich. Eq., 112; 4 Minn., 25; 16 Md., 508; Lewin on Trusts, 651.

What length of time would suffice for such a purpose is left uncertain upon the authorities. White Leading Cases in Eq., 158-168; *Mitchell v. Berry,* 1 Metc. (Ky.), 602; *Jenison v. Hogford,* 7 Pick., 1. Perhaps it may be that the statute of limitations of three years on a parol promise may furnish the proper rule.

In the present case the plaintiff was present at the sale by the mortgagee, and did not object. He afterwards retained possession of the land as the tenant of the defendant for a year, and apparently after the end of the year, although the date is not given, received from the defendant the residue of the sum for which the land sold, after (200) deducting the rent.

This action was brought on 25 January, 1875, soon after the expiration of his term as tenant. The sale was on 20 June, 1873. No case holds that a mere acquiescence for so short a time bars an action. There is nothing in the case from which it can be inferred that the conduct of the plaintiff or his delay to sue has induced the defendant to put himself in any worse position than he was in immediately after the sale. The defendant says that plaintiff deteriorated the land during his occupancy of it. But it was still an ample security for the debt, and if that deterioration occurred during the tenancy, we must assume that it was guarded against in the lease, as it might have been.

The rights of no third persons have intervened, and the lapse of time is too short to raise any presumption of a release or abandonment of the right.

No fraud or ill conduct is imputed to the defendant. It is not alleged that it was known at the sale that the purchaser was bidding for him, or that the price was diminished by such bidding.

But the interest of a vendor and a purchaser are so antagonistic that the same man cannot safely be allowed to fill both characters. *VanEpps v. VanEpps,* 9 Paige Ch., 241. No doubt there are exceptional cases in which a mortgagee may sell with perfect fairness, and to the advantage of the mortgagor, and buy. But a court can never know with certainty that it has been so in any particular case, and is obliged to act upon the general rule for the prevention of unfair dealing.

The defendant cannot be injured by having the value of the land ascertained by a public sale, under the order, and by an officer of a court, and an adjustment of the account between him and (201) the plaintiff, after such sale. Judgment below.

PER CURIAM. Affirmed.

Cited: Bruner v. Threadgill, 88 N. C., 368; *Gibson v. Barbour,* 100 N. C., 198; *Whitehead v. Whitehurst,* 108 N. C., 461; *Averitt v. Elliott,* 109 N. C., 563, 564; *Jones v. Pullen,* 115 N. C., 471; *Sherrod v. Vass,* 128 N. C., 51; *Owens v. Mfg. Co.,* 168 N. C., 399.

(202)

STATE ON RELATION OF J. C. L. HARRIS, SOLICITOR, v. C. B. HARRISON, GUARDIAN, AND OTHERS.

Guardian and Ward—Receipt of Ward's Money as Administrator by Guardian—Breach of Guardian Bond—Rights of Ward—Liabilities and Rights of Sureties on Bond.

A minor, J., recovers a judgment against H., administrator *c. t. a.* of McK., her late guardian. H. afterwards (28 October, 1871), under a decree, sells the land of his testator to pay debts of estate, J.'s judgment having priority. On 7 November, 1871, H. qualified as guardian of J., his step-daughter, giving bond. The purchase money of the McK. lands amounts to largely more than J.'s judgment, the wife of H. purchasing much of it. Such of the purchase money as H. actually collects he does not separate from his own or from the administration money, but spends it while in his hands. In his guardian return he charges himself with the whole amount of the judgment. The administration sureties are solvent: (1) *Held*, that whether the *administrator* wasted the fund or not, it was the *guardian's* duty to collect the judgment, it being collectible; and his failure to collect it was a breach of his guardian bond, for which he and his sureties are liable. (2) *Held further*, that as the guardian did not act in good faith, he and his sureties are liable for the full amount of the debt to the ward, although she might collect it out of the administration bond; that she has her election to sue either set of sureties or both, and to get judgment against both and collect out of one, leaving them to adjust their equities among themselves. (3) The defendants (sureties on the guardian bond) will be substituted to the right of the ward, and may pursue any equities which they have against the administration sureties, or the purchasers of the McK. lands.

RODMAN, J., did not sit on the hearing of this case.

ACTION brought by the solicitor of the Sixth Judicial District (203) under Bat. Rev., ch. 53, secs. 21, 23, to secure the estate of Lee A. Jeffreys, ward, after the removal of the guardian, Carter B. Harrison, and heard upon exceptions at January Special Term, 1877, of WAKE, before *Schenck, J.*

The complaint alleged the appointment and qualification, as guardian, of the defendant Harrison, the execution of the guardian bond by the defendants, the failure to renew his bond by Harrison, his removal by the clerk, and the breach of the bond.

The defendant sureties denied their liability on the bond. The case was referred to Thomas M. Argo to take an account, and his report was filed at Fall Term, 1876.

The commissioner filed an elaborate report, finding upon all the matters of fact involved; those facts material to an understanding of the opinion being as follows:

1. The father of the ward died in 1856, leaving her the only child, and A. McKnight, her grandfather, became her guardian.

2. McKnight died in 1867, and the defendant Harrison qualified as his administrator with the will annexed, giving bond with W. F. Green and others as sureties.

3. At Spring Term, 1868, of Franklin Superior Court a decree was rendered in an action brought by the ward, through one Norwood as next friend, against Harrison as administrator of McKnight, for $5,997.86, with interest on $5,895.66 from 6 April, 1868. It does not appear from the record that any of the $5,997.86 was ever paid.

4. In August, 1869, Carter B. Harrison filed a petition in the Superior Court of Franklin to make real estate assets, in which all persons interested in the estate were made parties. The cause was referred, and afterwards a decree was rendered finding the estate indebted to the children of the deceased McKnight, Mr. C. B. Harrison, Mrs. Ellis, and Mrs. Ellis's daughter (Miss Egerton), and to the ward, Lee A.
(204) Jeffreys; and the debt of the ward, $5,997.86, was declared of the highest dignity and to have priority.

In pursuance of the decree, Harrison sold land to Mrs. Ellis to the amount of $3,857; to his wife, Mrs. Harrison, to the amount of $7,155.75; to one Boulton, $1,749.94; and to W. F. Green, $2,083.

Harrison received in cash from Green and Boulton $3,839.33, and from Mrs. Harrison $834 (being part of the proceeds of some of the land resold). Some of the land was afterwards mortgaged to one Perry, and $1,555.23 raised thereby was paid to Mrs. Ellis on account of the balance due her from the McKnight estate.

Harrison kept no separate bank account as guardian and of the different amounts received in cash from the land sales; all that did not go to the payment of fees and expenses and to Mrs. Ellis was used by the guardian as he would his other money, as follows:

Of the $957.28 received in October, 1871, from Green and Boulton, there was paid to attorneys and referees $800; the balance, the guardian used for himself.

The $2,874.70 received October, 1872, Harrison charges himself with, both in administration and guardian returns. He did not deposit it to the account of his ward, but spent it as he would any other money.

The $1,773.01 charged in guardian returns of 1872 he retained to pay expenses which he had incurred in behalf of his ward, from 1868 to 1871, claiming that she was indebted to him in that amount.

The $834 paid by Mrs. Harrison in December, 1872, Harrison used, though he charges himself with it in his administration account.

The $1,555.23 paid by Mrs. Harrison (raised by mortgage to Perry) went to pay Mrs. Ellis's balance due her from McKnight's estate.

The $1,000 paid by Green in January, 1874, Harrison used (205) as his own.

The deeds were made for the land purchased by Mrs. Harrison before the purchase money was due.

A certain other tract known as the Gilly Jeffreys land was sold for $1,471.

5. There could be made out of the sureties on the administration bond of C. B. Harrison some $6,000 or $7,000. The land in possession of Mrs. Harrison is worth now what she paid for it, and the rest of the McKnight land is also worth the price it brought at the sale.

Mr. and Mrs. Harrison were married in 1860, without marriage settlement. The $2,363.73 found to be due her from McKnight's estate was due her from her father, McKnight, before her marriage.

At Fall Term, 1874, Harrison filed his account as administrator of McKnight, charging himself as due Lee A. Jeffreys $5,997.86 and interest on $5,895.66 from 6 April, 1868, to 11 September, 1874 ($2,274.74), making $8,272.60; and credits himself with same amount as paid to Harrison, guardian. In his guardian returns he charges himself with amounts received at different dates from the land sales as above set forth, amounting to $6,566.66 on 20 January, 1875, in which year he was adjudged a bankrupt, and is insolvent. On 7 November, 1871, he qualified as guardian and was then solvent.

At Fall Term, 1876, of Franklin Superior Court the sureties on the guardian bond brought suit against Mr. and Mrs. Harrison and the sureties on the administration bond and the purchasers and terretenants, to obtain indemnity from the administration sureties, and to subject the land sold to Mrs. Harrison to the payment of the $5,997.86 judgment rendered against Harrison in favor of Lee A. Jeffreys in April, 1868; and if that should not be sufficient, then the administration bond to be held liable, etc.

The commissioner finds as conclusions of law that the guardian, (206) Harrison, and his sureties are liable for the following sums received from McKnight's estate: $1,773.01 received from the sale of perishable property of said estate; $656.23 from Boulton for land; $781.12 from Green; $656.25 from Boulton; $781.12 from Green; and also for interest on $5,895.66.

The commissioner does not charge him with the $834, the $1,555, nor the $1,000 mentioned above.

The ward's expenses largely exceeded the income of the estate. The total amount due on 15 April, 1876, was found to be $6,219.62. To this report both plaintiff and defendants Ruffin and Blount filed exceptions.

Plaintiff's Exceptions: (1) To the allowance of commissions out of the principal of the estate. (2) Because the commissioner did not

charge the guardian and his sureties with $1,581.82, which he assumes to be due and uncollected on the judgment against McKnight's administrator for $5,895.56, although it appears from the report that he had in hand more than that amount as administrator which he could have applied in discharge of said $1,581.82, and although the guardian charged himself with said amount in his guardian returns.

Defendants' Exceptions: (1) Because commissioner does not find as a fact that no part of the judgment for $5,997.86 was ever paid by Harrison, administrator, to Harrison, guardian. (2) Because he finds the legal proceedings mentioned above (paragraph 4) to be a "petition," and not an "action." (3) Because he fails to find that the claim of Mrs. Harrison against McKnight's estate for $2,363.73 was unjust and stale, and had never been asserted against McKnight during his lifetime, nor against the estate until it appears in the consent proceedings in August, 1869; that if due at all, it was due C. B. Harrison in right of his wife when he became administrator in 1867, and as she was (207) then indebted to the estate, it was discharged by operation of law. (4) Because he did not find distinctly that the Superior Court of Franklin did not make an order authorizing Harrison to make title to the lands of the McKnight estate sold by him as administrator. (5) Because he finds that Mrs. Harrison paid C. B. Harrison $834 on 21 December, 1872, against the evidence. (6) By consent, the statement is amended by fixing the amount paid by Green to Harrison at $875 instead of $1,000. (7) Because he finds that the $1,553.23 raised by mortgage 28 July, 1875, *was considered* a payment to C. B. Harrison, administrator, by Mrs. Harrison, on land purchased by her, etc. (8) Because he has failed to find as a distinct fact that Harrison, administrator, never separated and distinguished the sums of Boulton and Green, amounting to $2,874.70, from other moneys held by him as administrator of McKnight, but applied them to his own use while he yet held them as administrator, and that the guardian returns in which he charges himself therewith were made long after the respective sums had been received, and were eloigned, etc. (9) Because he finds that the $1,773.01 charged in his guardian returns he retained to pay expenses which he had incurred in behalf of his ward between 1868 and 1871; whereas there is no evidence of this, etc. (10) Because he has found that Harrison charged himself as administrator with the $1,000 received from Green on 14 June, 1874, whereas there is no evidence, etc. (11, 12) Relate to the "Gilly Jeffreys land." (13) And because he finds that Harrison was solvent in 1871, contrary to the evidence.

Defendants' Exceptions to Findings of Law: (1) Because the commissioner has debited the guardian sureties with $1,267.53 of interest on the decree of April, 1868, for $5,895.66, accruing between 6 April, 1868,

and 7 November, 1871; whereas all the interest (as we contend) remains accrued and yet due to the ward as by the decree in her name by her guardian *ad litem*, Norwood, in Franklin Superior Court, (208) which decree is amply secured by the real estate of McKnight and the administration sureties. (2, 3, 4, 5, 6) Relate to the interest charged after 1871, and the different sums charged against the defendant; defendants contending that the whole of the decree for $5,895.66 remains unpaid and is yet good and collectible, and exceeds the whole principal of the ward's moneyed estate; and though there may have been a technical breach of the guardian bond, the damage sustained is only nominal, since it is yet within the ward's power to enforce the payment of the decree, etc. (7) That excess of expenditures for years before 1875-76 should be credited with $187, excess of income for said years. (8) And that the costs actually incurred and paid by Harrison on account of the proceedings therein should be credited on the decree for $5,895.

His Honor upon full argument sustained defendants' exceptions 1, 2, 4, 8, 11, and overruled 3, 10, 12, 13. As to exception 5, he finds that Harrison had in his hands $834 raised by mortgage of Mrs. Harrison's lands, and retained the same as a payment. It was agreed in exception 6 that the amount should be $875. As to exception 7, he finds that the $1,553.33 paid by Harrison to Mrs. Ellis was raised by a mortgage on Mrs. Harrison's lands. As to exception 9, he overrules the commissioner's finding that "Harrison retained this money to pay expenses incurred on account of ward from April, 1868, to November, 1871," and also finds that when Harrison qualified as guardian in 1871 he had no cash on hand belonging to his ward.

His Honor overruled plaintiff's exception 1, and was of opinion that exception 2 of plaintiff settled the whole case; and he found as a fact that the McKnight estate was abundantly solvent when the Lee A. Jeffreys judgment for $5,895.66 was taken, in 1868, and that it had priority over all other debts of McKnight; that Harrison and the sureties on his administration bond were solvent in 1871; and that Harrison had assets in his hands as administrator, available and applicable to this judgment, which he should have applied in satisfaction (209) thereof.

The plaintiff insisted that this judgment was extinguished in 1871, when Harrison became guardian (upon the authority of *Muse v. Sawyer*, 4 N. C., 637), and if this was not so, then the facts found by the commissioner show there had been such an application of the assets of McKnight's estate by Harrison as administrator as to make the guardian bond liable, and that the law raised a presumption of fact at least that the assets were so appropriated and transferred. The court held that

the judgment was not extinguished, but there was a presumption of fact that there was a transfer, which threw the burden of proof on defendant; and was further of opinion that the guardian and his sureties were liable for the whole of the Lee Jeffreys judgment, upon the ground that it was the guardian's duty to collect it, as it was in his power to collect it.

The plaintiff's exception 2 was therefore sustained, and the commissioner directed to reform the account so as to charge the defendants with the whole of said judgment, with this modification, that said exception 8 of the defendants is allowed, and the commissioner is to deduct from said judgment its contributive share of the costs. The other exceptions were overruled.

After the report was submitted it was suggested that the ward had intermarried with E. G. Brown, and the defendants moved either to suspend proceedings until E. G. Brown and wife voluntarily made themselves parties plaintiff or to compel them to be made such, in order that the judgment finally made in the action might completely determine all the matters of controversy involved therein; and upon the plaintiff's objection, the motion was denied. But before the exceptions
(210) thereto were heard, and on motion of the plaintiff, said Brown was appointed receiver of the ward's property; and thereupon the defendants moved the court either to bring in as parties Mrs. Harrison and the terre-tenants of the McKnight lands and the sureties on Harrison's bond as administrator of McKnight, because the court (as defendants alleged) was obliged to see at the present stage of the proceedings that a complete determination could not be had without the presence of these parties, or to require the receiver to proceed to enforce the collection of the Jeffreys judgment against Harrison, administrator, from the McKnight lands and the administration sureties, and to ascertain if the judgment had been lost by Harrison's failure to collect it. This motion was also resisted by the plaintiff and denied by the court.

To so much of his Honor's ruling on the exception which sustains the plaintiff's second exception and overrules in whole or in part the defendant's third, fifth, ninth, tenth, twelfth, and thirteenth exceptions to the facts, and first, second, third, fourth, fifth, sixth, and seventh exceptions to the law, the defendants excepted. Judgment for plaintiff. Appeal by defendants.

D. G. Fowle for plaintiff.

E. G. Haywood and Busbee & Busbee for defendant sureties.

READE, J. In 1868 the *feme* plaintiff, then an infant, recovered judgment against C. B. Harrison, administrator of McKnight, her former guardian, for $5,997.23.

In 1871 said Harrison became the guardian of *feme* plaintiff, and sold her land for $1,471.

The two sums make $7,468, no part of which has been paid to *her*. And this action is brought to recover it of the defendants, sureties on Harrison's guardian bond.

The estate of McKnight was solvent; Carter B. Harrison, now bankrupt, was solvent; his administrator sureties were and are solvent; and his guardian sureties are solvent. And yet his ward, (211) the *feme* plaintiff, now at maturity, cannot get her estate. The administrator sureties say that they are not liable, because the administrator, Harrison, paid over the estate to the guardian, Harrison, which the guardian sureties deny; and both sets of sureties say that that is not a question for them to settle among themselves, nor is it for them to furnish the plaintiff with any information, but that it is for her to find out as best she can; and if she sue either set, and fail to make out a *clear* case, she must fail.

This does not sound well, to say the least.

If this is the law of administrations and guardianships, then the law has either been badly made or badly interpreted.

It would seem that the law *ought* to be that the administrator should be required to show precisely what came or ought to have come to his hands, and what he did with it; and that the guardian should show precisely what came or ought to have come to his hands, and what he did with it; and that all this ought to appear of record, so that the ward, who has all the while been dependent, and whose estate has paid both administrator and guardian for the discharge of these duties, should have nothing to do at her majority but to look to the record in order to ascertain her rights.

What it would seem the law *ought* to be, that we find it *is*, both by statute and the decisions of the Court.

The statute requires that a guardian shall endeavor to collect, by all lawful means, his ward's estate, on pain of being himself liable for the same if he neglect, and shall make early and frequent returns thereof on oath; and, on failure to do so, shall be put in jail until he does; and shall give bond, with sureties, conditioned that he shall faithfully execute the trust reposed in him. Bat. Rev., ch. 53.

It is difficult to see how anything could be more binding on (212) his power or on his conscience. And the same is true of his sureties. Whenever, therefore, anything has come or ought to have come to the guardian's hands, he and his sureties are liable to the ward. Why, then, are not the defendants liable in this case?

We have examined with care the elaborate report of the referee, and the exceptions thereto, and the learned brief of the defendant's counsel, and the principal defenses are twofold:

1. "That the sureties on the guardian bond are not liable, *as for money collected and not accounted for,* for money received by Harrison, administrator, and wasted by him before he made it his ward's money." And that in order to make it his ward's money, it must have been separated and set apart or otherwise appropriated by the administrator to the guardian.

2. "That the sureties on the guardian bond are not liable for the guardian's *failure to collect* the judgment in favor of the ward ($5,997) against the administrator, *if that judgment is still collectible by the ward.*"

In order to make the first proposition fit the case, we must strike out "as for money collected and not accounted for," because the learned counsel would not ask us to consider the proposition whether a man is liable *as for money had and received,* when in fact he never received the money; and because the question is not whether the guardian sureties are liable in one form or in another, but are they liable in any form for money which Harrison received as administrator and wasted before he made it his ward's money? With this correction, both propositions are erroneous.

In opposition to the first proposition, the law is, that if the administrator had the fund and wasted it, or whether he wasted it or not, it was the duty of the guardian to collect, it being collectible. And his failure to collect was a breach of his bond, for which he and his (213) sureties are liable in damages. The amount of damages will be considered further on.

In opposition to the second proposition, the law is, that the guardian not having acted in good faith, he and his sureties are liable for the full amount of the debt to the ward, although she might collect it out of the administration bond; that she has her election to sue either set of sureties, or both, and to get judgment against both, collecting only out of one, and leaving them to adjust their equities among themselves.

1. The authorities mainly relied on by the defendants to support their first proposition—that the guardian is not liable unless the administrator separate the fund and turn it over to the guardian—are *Clancy v. Dickey,* 9 N. C., 497; *Harrison v. Ward,* 14 N. C., 417; *Clancy v. Carrington,* 14 N. C., 529; *Winborn v. Gorrell,* 38 N. C., 117.

Only the first one of these cases was upon a guardian bond, and there was a recovery *against* the guardian, and therefore it could not be an authority in *favor* of a guardian except in so far as something might be said in the opinion, by the way. But there was not even that. The case was elaborately argued by Gaston and Ruffin and there were opinions by *Taylor* and *Henderson.* The guardian before his appointment had married an executrix, who as such had possession of the slaves

in controversy, and by his marriage he became executor in right of his wife, and of course her possession was his possession, and being in possession, he was appointed guardian of the ward; and the question was, whether his possession was as executor or as guardian. *Henderson, J.*, said, "that having the slaves in possession as executor in right of his wife, after the time allowed by law for the performance of the trusts of the will, by being appointed guardian to the child, he *ipso facto* became possessed of the slaves in his capacity as guardian."

There could be no stronger declaration against the defendant than that case, which is cited in his favor, if the fund in this (214) case were property.

The second case, *Harrison v. Ward*, was not against a guardian, but the sureties of an administrator, who sought to exonerate themselves by showing that the administrator had rendered his final account, and was then appointed guardian, and that, like as in *Clancy v. Dickey, ipso facto,* he was released as administrator, and became bound as guardian. Note that the question was not whether he had become bound as guardian, but whether he was *ipso facto* released as administrator. And it was held that he was not, the Court saying that that would have been the case if it had been property, as in *Clancy v. Dickey, supra,* but it was not so with money, unless separated and marked. But this Court did not say that a guardian could not be charged unless money was marked and set apart to him. The Court was trying to show how hard it is for one charged with a trust to discharge himself, and that the burden is upon him to show *clearly* his discharge; that he cannot discharge himself by showing that probably some one else is bound. And yet the defendant dexterously turns this to his advantage, by insisting that it ought to be as hard to tie as to unloose. *Non sequitur.*

The third case, *Clancy v. Carrington*, was decided at the same term with *Harrison v. Ward,* and was expressly said to be governed by it.

In *Winborn v. Gorrell* the wards were pursuing a third person, who had obtained from their guardian land upon which they had a lien, and the third person set up the defense that they ought to go against the sureties on the guardian bond. But the Court held that it was proper and just that they should go against the third person, who had improperly dealt with the guardian, and thereby relieve the sureties on the guardian bond. And thence it is insisted that because the wards *could* go against the third person, and it was proper and just (215) that they should do so, they could *not* go against the sureties of the guardian. But the decision was precisely the other way. *Ruffin, C. J.*, said: "It may be true that the wards may sue their father on his bond for the purchase money, and also might charge him and his sureties on their guardian bond; but that does not preclude them from insisting *also* on their real property security."

There could scarcely be a stronger case against the defendants than this; for instead of confining the wards to one remedy, or to a remedy against one, it gives three remedies against three different persons—against the land, or against the bond for the purchase money, or against the sureties on the guardian bond. The Court in that case did not leave the wards, as it is sought to leave the ward in this case, to cry like a child for a bird in the air, not knowing where to find it, or how to catch it; but, upon finding that the guardian did not have their estate in hand to deliver over to them, gave them a remedy against any one else that had it, or against his sureties, who undertook that he should have it.

Foye v. Bell, 18 N. C., 475, was also cited. In that case the sureties of a guardian becoming uneasy about his solvency obtained an order of court that he give a new bond and sureties, and the order expressly released them. And when the ward sued them, they set up the defense that they were released and that the new sureties were bound. The Court held that they were not released, they not having shown affirmatively any actual change of the effects from the old to the new fiduciaries. But the Court did not hold that the new sureties were not also bound. The contrary is to be inferred, for *Ruffin, C. J.*, in his opinion says that

"of course this opinion is not intended to affect, nor can it affect,
(216) the rights of two sets of sureties as against each other, either in respect of contribution between them or of the obligation of the posterior set as substitutes to exonerate those who were prior, which rights depend on other considerations, and perhaps can be finally adjusted only in another tribunal"—equity. Nothing can be clearer from that case than that the ward had his remedy against both sets of sureties, and it was for them to settle their liabilities among themselves. And so in this case, both sets of fiduciaries are liable to the plaintiff; and then they may settle their liabilities among themselves.

Jones v. Brown, 68 N. C., 554, was also decided against the defendants. There a guardian became trustee, and was sued as guardian with his sureties, and set up the defense that the sureties were discharged, and he became liable as trustee. It was held that they were not discharged; but it was not held that the trustee was not also bound.

The only other case cited by the defendants from our own reports was *Jones v. Brown,* 67 N. C., 475. We fail to apprehend its bearing in this case. It decides that a trustee is a proper relator in a suit against the guardian for the trust fund.

It will thus be seen that every case cited by the defendants is either directly or by implication against them on the first point.

2. In support of their second proposition—that the defendants are not liable if the debt is still collectible by the ward—they cite a number of authorities. Those in our own Court we will discuss, and show that

they do not sustain, but are against the position. Before doing so it is to be remarked that there are no facts upon which the proposition can be founded, except in part, because it appears that Harrison, administrator, sold real estate for assets more than enough to satisfy the judgment of $5,996.27, and that if he did not collect enough of the land money to pay all of the debt, yet he certainly collected very nearly enough.

And furthermore, before considering the authorities cited, it is (217) proper to concede the general rule, that a collecting agent who fails to collect is liable only for the loss sustained by his failure. And so we concede that a guardian who acts in good faith and has his ward's estate *in hand,* although it may consist in whole or in part of evidences of debts uncollected, is not liable "as for money had and received," nor for not having received or collected, because it is his duty to keep the money invested; and if it be well invested, he can insist upon his ward's receiving the evidences of debt as money. But that is not the rule where the investments are not well secured, or the fund not ascertained, or the debtor not known, or not within reach of process, and the like cases. Nor is it the rule in any case where the guardian has been negligent, or has not acted in good faith.

The first case cited by defendant was *Governor v. Matlock,* 8 N. C., 425. A sheriff was sued for an escape of a debtor in execution: held, he was not liable for the debt, but for the loss resulting from the escape.

So *S. v. Skinner,* 25 N. C., 564. Notes were given to a constable for collection, and when sued he tendered the notes back and they were still collectible: held liable only for the loss for not collecting, and not for the whole debt.

In *S. v. Eskridge,* 27 N. C., 411, notes were given to a constable for collection, and when sued he did not return the notes, but the debtors were still solvent: held liable for the whole debt. And this was because of his negligence in not collecting, and his bad faith in not returning the notes.

In *McRae v. Evans,* 18 N. C., 243, a sheriff was sued for not making the money on an execution. His defense was twofold: first, that he was directed by the plaintiff to hold it up, and, second, that the debt was still collectible. It was held that the first defense, if proved, was a good one, and that the second defense, if proved, relieved him from paying the debt, but left him liable for loss. And note that it was further held that the burden of proving that the debt was still collectible was on the sheriff, *"and that it should be fully shown."* (218)

How does that fit our case, except to show that the plaintiff is entitled to recover; because it is not "fully shown" that her debt is collectible in any other way?

Brumble v. Brown, 71 N. C., 513, is to the same effect against a collecting officer.

Covington v. Leak, 65 N. C., 594, and the same case in 67 N. C., 363, are the only other cases cited by the defendants upon this second proposition, and they are conclusive against them.

In the first report of the case it appeared that the guardian had, in 1863, recovered a judgment against the administrator, who had qualified in 1857, and the administrator offered to pay the judgment, at the time it was rendered in 1863, in Confederate money, which the guardian refused to receive, and then the administrator became insolvent. After the close of the war it was sought to make the guardian liable for not collecting the judgment out of the administrator. The defense for the guardian was that he ought not to have taken payment in Confederate money during the war, and that after the war the administrator was broke. And upon that defense the court below held that the guardian was not guilty of negligence in not collecting the judgment out of the administrator. And so we would have held here, but it did not appear in the record whether there were not solvent sureties to the administration bond. If there were, then we hold that the guardian would be liable for not collecting it out of the sureties, *Justice Rodman* saying in his opinion: "If they were solvent, surely it was the duty of the guardian to have made good the debt." And we sent the case back to have that fact ascertained.

When the case came back again, it appeared that the administrator sureties were solvent, and were living, and that the judgment (219) debt was perfectly good and collectible by the wards. And then we held that under the circumstances of the case—the war, Confederate money, stay laws, and the condition of the country—the guardian was not guilty of negligence, and that there was no difficulty in the way of the wards collecting the judgment out of the administration sureties, *Justice Rodman* saying: "The highest degree of good faith is exacted of a guardian, but only ordinary diligence, and certainly not infallible judgment. In difficult circumstances, when there is no reasonable suspicion of his good faith, and when, so far as appears, he has acted honestly according to his judgment in the emergency, the law requires no more."

What does that mean, if it be not that the guardian would have been liable for not collecting the debt out of the administration sureties if he had not acted in good faith?

Did the guardian in this case act in good faith? The whole defense is based upon the idea that he did not. Were there any circumstances of war, depreciated currency, or stay laws, to excuse him? Is the judgment still unsatisfied and the sureties fully solvent and no difficulty in

the way of the plaintiff's enforcing it? Who knows all this? How can it be "fully shown"? The defendants themselves show that it is not so, for they have all the right to pursue the administration sureties and the administration fund that the plaintiff has, and they have had to enter into troublesome and expensive litigation against the administration sureties, and the purchasers of the lands, to try and work up their liabilities.

In *Powell v. Jones,* 36 N. C., 337, a guardian had sold a bond belonging to his ward's estate, and had become insolvent, and left the State. The wards first sued the sureties of the guardian and got judgment against them for the amount of the bond. They then sued (220) the assignee of the bond, and he set up the defense that they had their remedy against the sureties of the guardian, and that they had in fact sued and recovered a judgment against them, and that they were solvent: held, that the ward "may elect to have satisfaction out of which he pleases."

So in *Fox v. Alexander,* 36 N. C., 340, a guardian had improperly sold a bond of his ward, and the ward sued the sureties of the guardian, and collected the money out of them, although he could have collected out of the assignee of the bond; and then the sureties collected it out of the assignee.

So in *Horton v. Horton,* 39 N. C., 54, the decision was to the same effect. The duty of a guardian is to *gather,* and neither to *scatter* nor allow to be scattered his ward's estate, on pain of being himself liable if he neglect.

Our conclusion is that the defendants are liable, not only for what the guardian Harrison did receive from the estate of McKnight, but for what through his neglect and bad faith he failed to receive; and this without regard to the fact that the plaintiff ward might have a remedy against the sureties of the administrator of McKnight's estate, and against the purchasers of the McKnight and Gilly Jeffreys land. And then the defendants will be substituted to the rights of the ward, and may pursue any equities which they have against others.

This view of the case substantially overrules all of the defendants' exceptions to the report, and sustains the plaintiff's second exception.

It will be referred to the clerk of this Court to reform the account stated by the referee, by adding the item embraced in the plaintiff's second exception, and report the account as reformed, and (221) then there will be a judgment here for the amount.

The clerk will be allowed $20. The plaintiff will recover costs. The judgment below is affirmed as before stated. The allowances to referee and solicitor are not considered.

PER CURIAM. Judgment accordingly.

Cited: Ruffin v. Harrison, 81 N. C., 209; *Luton v. Wilcox,* 83 N. C., 24; *Street v. Tuck,* 84 N. C., 607; *Culp v. Lee,* 109 N. C., 678; *Culp v. Stanford,* 112 N. C., 668; *Holden v. Strickland,* 116 N. C., 192; *Loftin v. Cobb,* 126 N. C., 58, 61.

(222)

STATE ON RELATION OF J. Y. ALLISON, ADMINISTRATOR *d. b. n.* OF M. A. BLACKWELDER, v. T. H. ROBINSON, ADMINISTRATOR WITH WILL ANNEXED OF L. C. KRIMMENGER, AND OTHERS.

Guardian and Ward—Proceeds of Ward's Real Estate—Action to Recover by Administrator—Parties.

1. The administrator of a deceased ward is not entitled to recover, in an action against the administrator of the deceased guardian, moneys which came into the guardian's hands as proceeds of real estate belonging to the ward sold under a decree of court for partition.
2. In such case the heirs at law of the deceased ward are necessary parties to the action, in order that the rights of all interested may be adjudicated in the same action.

SMITH, C. J., dissenting.

CIVIL ACTION on an administrator's bond, tried at July Special Term, 1877, of CABARRUS, before *Cloud, J.*

This is an action brought by the administrator *d. b. n.* of Margaret A. Blackwelder, deceased, to recover certain moneys belonging to her estate, which went into the hands of her guardian, L. B. Krimmenger, who, dying, the defendant Robinson became his administrator with the will annexed; against whom and the sureties upon his administration bond the present action is instituted.

Margaret, the ward, was one of the heirs at law and distributees of Wilson Blackwelder, and as such was entitled to a considerable real and personal estate, all of which came into the possession of her guardian, Krimmenger. By a decree of court, at the instance of the guardian, the land was sold for partition, and the ward's part of the proceeds of the sale was paid over to her said guardian. The ward died, an
(223) infant and unmarried. After the pleadings were in, references were made to ascertain and report, first, the indebtedness of the late guardian to his ward; and, second, to state the amount of assets in the hands of the administrator of the said guardian, applicable to the plaintiff's claim. Such proceedings were had upon these references that reports were made and confirmed by the court: (1) that the late guardian

was indebted to the ward in the sum of $2,617.90, of which sum $1,132.75 was personal estate and $1,485.15 was proceeds of the sale of the land aforesaid for partition; and (2) that the defendant Robinson, administrator with the will annexed of the guardian, had in his hands $1,949.80 presently applicable to the payment of this debt, and certain notes for $584.54, which had not been collected.

Upon this state of facts the plaintiff moved for judgment against the defendant for the full amount of assets in his hands, to-wit, $2,535.34. This was opposed by the defendant upon the ground that the plaintiff as administrator, in law, was not entitled to recover the proceeds of the sale of the real estate, which, not losing its character as land, upon the death of the ward descended to her heirs at law. And of this opinion was the court, and gave judgment for $1,132.75, the amount of the personal estate only. From this judgment the plaintiff appealed.

R. Barringer and W. H. Bailey for plaintiff.
Wilson & Son, W. J. Montgomery, and P. B. Means for defendant.

BYNUM, J., after stating the facts as above: So the question is, Can the administrator of the ward in this action recover the proceeds of the sale of the real estate which had been sold for partition (224) by the decree of the court, and paid to the guardian?

Before the adoption of the new Constitution, when the courts of law and the courts of equity were kept distinct and separate, the courts of law only looked at the legal relations of the parties to the action, as debtor and creditor, and not at the fund, as impressed, by its origin and history, with certain properties which in a court of equity imparted to it a different ownership and mode of transmission.

The law looked upon the fund as money only, no matter how derived, and upon the death of the owner devolved it upon the administrator; while equity went further, and looked into the derivation of the fund and stamped it with the character and laws of devolution of its origin. Hence, in *S. v. Satterfield,* 31 N. C., 358, which was an action at law, the administrator of the ward was allowed to recover upon the guardian bond the proceeds of the sale of land for partition, which had gone into the hands of the guardian. But the Court said: "Without deciding how the rights of the parties may be considered in a court of equity, we are of opinion that in a *court of law* the defendant having received money belonging to his ward, was after her death bound to pay it over to her personal representative, and that his refusal to do so was a clear breach of the bond, to the amount of the principal and interest." This case was followed by *Latta v. Russ,* 53 N. C., 111. That was an action at law upon an administration bond. There the administrator with the

will annexed died, having in his hands money arising from the sale of land decreed to be sold for the payment of debts, being a surplus remaining after the payment of the debts, and which money belonged by law to the persons to whom the land was devised. It was held that the administrator *d. b. n. c. t. a.* of the original testator was the proper person to bring suit for such money, and not the devisees. But
(225) this decision was rested upon the statute, Rev. Code, ch. 46, sec. 50, which provides that: "All the proceeds of the sale of real estate which may not be necessary to pay debts and charges of administration shall be considered real estate, and as such shall be paid by the executor or administrator to such persons as would be entitled to the land had it not been sold"; thus making it the duty of administrators to pay over the excess of the sale of real estate to devisees and heirs, just as it was before their duty to pay over the personal estate to legatees and distributees. "When, therefore," say the Court, "an administrator dies before he has completed the settlement of the assets derived from the sale of the real estate, by paying debts and paying over the excess to the devisees or heirs at law, this unfinished duty cannot be performed by his administrator, for there is no privity between him and the devisees and heirs at law, and it is consequently necessary that both of the deceased persons should be represented, so that the representative of the administrator should pay over the fund to the representative of the first intestate, whose duty it is made to complete the administration by paying off all the debts and paying over the excess to such persons as would be entitled to the land had it not been sold."

But what is the rule in a court of equity? It is the inflexible rule in equity that the proceeds of land sold for partition, to which an infant is entitled, remain real estate until he or she comes of age and elects to take them as money. In *Scull v. Jernigan,* 22 N. C., 144, Elizabeth Sharpe was one of several heirs of Jacob Sharpe, and entitled to a part of his lands, which were sold for partition by order of court, and her part of the proceeds was paid to her guardian. She intermarried with Jernigan, and her guardian then settled with the husband and paid to him her estate, including her share of the price of the land. The
(226) wife died without having had issue. The bill was brought by the heirs at law of Mrs. Jernigan, against the husband, to have the proceeds of the land declared to be real estate, and to belong to the heirs at law. It was held that they were entitled to recover. So in *March v. Berrier,* 41 N. C., 524, a part of the ward's land was sold by a decree of the court, and the proceeds paid over to the guardian of the infant. The ward died intestate and an infant, and the defendant Berrier administered on her estate, and received the money from the guardian, claiming it in right of his wife as personalty. The heirs of the

infant filed their bill and recovered it as real estate. This last case, in connection with *Scull v. Jernigan,* is important as showing the true grounds upon which courts of equity take jurisdiction and administer the rights of the parties. The first ground is, that when courts of equity order a sale of an infant's land in order to raise money for any purpose, or for partition, they would not upon their own principles or independent of any provision by statute allow their decrees to affect the right of succession to a surplus remaining after answering the purpose. The money stands for the land. But the second ground, by itself, seems conclusive without the aid of the general principles of equity. It grows out of the express provisions of the statute, Bat. Rev., ch. 84, sec. 17, which is taken from Rev. Statutes, ch. 85, sec. 7. After enacting that there may be a sale of land for division, it further enacts that if any party to the proceeding shall be an infant, etc., "it shall be the duty of the court to decree the share of such party in the proceeds of sale to be so invested or settled that the same may be secured to such party or his real representative." In commenting upon this statute, in *Scull v. Jernigan. Ruffin, C. J.,* says: "The last are the material words, as the question is, how the fund is to be treated after the death of the party when claimed by the two classes of representatives, personal or real. To that purpose the language is unequivocal. It is secured to the real representative, and is, of course, land in this Court. (227) . . . Had Mrs. Jernigan died an infant and unmarried, there can be no doubt that her heirs could have followed this money in the hands of the guardian, as real estate. There is nothing in the case to alter their rights."

To the same effect is *Gillespie v. Foy,* 40 N. C., 280; *Dudley v. Winfield,* 45 N. C., 91; *Bateman v. Latham,* 56 N. C., 35. The principle running through all the equity cases is that the heir at law may follow and recover the fund in whosesoever hands it may be, whether the guardian or his administrator, or administrator of the infant, or the husband. Their dealings with one another cannot change the equitable nature of the fund so as to disturb the rights of the heirs at law.

But now both legal and equitable rights are administered in the same action, upon the rational principle that there shall not be two actions for the same subject-matter, when a single action will afford a complete remedy. Assume that at law, prior to The Code, the administrator of the ward could sue for and recover a part or all this fund, it is clear that in equity the heirs, by another action, could have followed and recovered the proceeds of the land. As both actions are now combined, it would seem to follow inevitably that all the parties which were necessary to maintain the two actions must now unite in the one action, which comprehends both. The general rule in equity is, that all persons

interested in the subject of dispute must be parties, because that court seeks to arrange in a single action all the claims arising upon the subject of controversy. In this case it is evident that unless the heirs at law of the ward, as well as the distributees who are represented through the administrator, are before the court, their several rights to the fund cannot be determined, for the fund is not sufficient to satisfy the claims of both parties—those entitled to the personal estate of the ward
(228) and those entitled to the real estate—supposing them to be different persons.

If the administrator, plaintiff, had alleged and shown a deficiency of personal assets in his hands to discharge the debts of his intestate, and had made the heirs at law of the ward parties to this action, he would be entitled to condemn all or so much of the real fund as would be necessary for that purpose. But he makes no allegation of want of assets, and his only claim to recover this fund is that he is the proper party to recover and pay it over to the heirs at law. But as in this Court the real fund is land, and descendible as such, why should the heirs, in this more than in other cases of descent, be compelled to reach it in this roundabout way, instead of directly and immediately from the intestate? And suppose there had been no administration, or he had refused or delayed to bring an action for the recovery of this fund, are the heirs thereby to be hindered or delayed in coming to their inheritance? The heirs do not claim through, but above, the administrator, and immediately from the intestate; and whoever holds the real fund at the death of the ward holds it for the heirs and is directly amenable to their action to recover it. If the heirs had brought the action against the defendant Robinson, the administrator of the ward would have been a necessary party, as a representative of the creditors and distributees of the intestate. For the same reason the heirs are necessary parties to this action, that the rights of all may be adjudicated in the same action, instead of putting the heirs, as it may be, to another action against the administrator of the ward.

It does not appear why the action was not brought upon the guardian bond, instead of the bond of the administrator. As the only point presented by the appeal is that which we have discussed, we can notice no others. We think the court did not err in refusing to give the plaintiff judgment for the amount of the entire fund, and if nothing else
(229) appeared, we would affirm the judgment. But as it also appears that the heirs at law of Margaret A. Blackwelder are necessary parties to the action and may be prejudiced by the affirmance of the judgment, we think it best and least expensive, not to dismiss the action for want of proper parties, but to vacate the judgment and remand the case, to the end that the heirs at law aforesaid may be made parties

plaintiff or defendant, with leave to amend the pleadings as far as the new parties are concerned, and that the case may be then proceeded with according to law. The accounts as reported and affirmed will not be reopened. The plaintiff will pay the costs of appeal.

SMITH, C. J., dissenting: While concurring with the Court in the disposition made of the case, I cannot assent to the reasoning by which the result was reached.

L. B. Krimmenger as guardian to the plaintiff's intestate, who died before attaining 21 years of age, as part of his ward's estate, received a sum of money arising from a sale of her land and paid to him by order of the court directing the sale. This fund as well as the other personal estate of the ward was mismanaged and lost. The guardian died leaving a will, and the defendant T. H. Robinson was appointed administrator *cum testamento annexo* of L. B. Krimmenger, and gave the bond on which the action is brought against him and his sureties.

The defendant Robinson, as such administrator, took possession of the personal estate of the guardian and received assets sufficient to discharge his liabilities to the ward. The question is, Can the plaintiff recover in damages the value of the fund derived from the sale of the land, lost by mismanagement of the guardian, or must the suit to recover this part of the estate be brought on the relation of the heirs at law of the intestate infant?

In my opinion, the plaintiff is entitled to recover damages for (230) the entire estate lost, without discrimination as to the sources from which any part of it was derived. It is not disputed upon repeated and uniform adjudications in this State, and various statutory provisions, that money arising from the sale of an infant's land, until changed by some valid act of conversion after the infant attains majority, retains the qualities and properties of the land it represents, for the purpose of ascertaining to whom under the law it rightfully belongs. But this doctrine applies only to *claimants* of the fund. Its nature as personal property is not changed, nor is the responsibility of the guardian for its care and management different from that which attaches to other personal property. Accordingly, in two of the cases cited at the bar the fund treated as land still in the view of a court of equity had been recovered or reduced to possession by the administrator, and was pursued in his hands by the heir, and charged with a trust in his favor.

Although legal and equitable rights are under our present system administered by the same court, yet the essential distinction in those rights and the remedies to enforce them cannot be lost sight of without introducing perplexity and uncertainty. This action is on the administration bond to recover *damages* for a breach of trust, and should be con-

trolled by those general rules that formerly governed a legal proceeding. No case has been called to my attention where an heir at law has prosecuted an action to recover the fund, or to secure his interest in it, until it has been reduced to possession or subjected to the control of the personal representative. The right to sue is essentially a personal right vesting in the infant, and at her death transmitted to her administrator, who represents her as to all her rights of property, except her specific interest in land remaining such until her death, and which thus descends to her heirs at law. The damages arising from the breach of
(231) trust, and measuring the value of the property lost and the injury sustained, are personal, and the right to recover them vests only in the person who succeeds to all the choses in action that vested in the infant. To whom the fund shall be paid, and the respective claims of creditors, distributees, and heirs thereto, are matters which must be afterwards ascertained and adjudged.

This view is in my opinion fully sustained by an express adjudication of this Court in *Latta v. Russ*, 53 N. C., 111.

The facts of that case are these: Richard Crabtree died, having made his will and devised certain of his lands to Thomas J. Latta and wife and others. The executors named in the will renounced, and his widow was appointed administratrix with the will annexed. She filed her petition in the proper court, and obtained license to sell the devised lands for payment of debts. There was a surplus arising from the sale of the land in her hands when she died. The defendant Russ then became her administrator, and administration *d. b. n.* with the will annexed was granted to the relator. The action was brought by the administrator *d. b. n.* upon the bond of the administratrix, against her administrator and sureties, to recover the fund derived from the sale of the land. This was resisted by the defendants upon the ground that the surplus arising from the sale of the land, made assets, belonged to the devisees, and that they alone as relators could sue. The Court declared that the objection that the action cannot be maintained by the administrator *d. b. n.* was not tenable, and *Pearson, C. J.*, in delivering the opinion, says: "Where an administrator dies before he has completed the settlement of the assets derived from real estate by paying debts and paying over the excess to the devisees or heirs at law, this unfinished duty cannot be performed by his administrator, for there is *no privity* between him and the devisees and heirs at law; and it is consequently necessary that both of the deceased persons should be represented, so that
(232) the representative of the administrator should pay over the fund to the representative of the first intestate, whose duty it is made to complete the administration by paying off all the debts, and paying *over the excess* to such persons as would be entitled to the land had it

not been sold. In other words, between the administrator *d. b. n.* of the first intestate and his creditors and devisees or heirs there is a *privity;* whereas there is no privity between the latter and the administrator of the first administrator."

This lucid statement of the true doctrine would seem to be decisive of our case, and to render further discussion needless. It may not, however, be inappropriate to notice some of the many difficulties to be encountered in permitting the heir at law to sue and recover this money. If the specific fund is to be treated as land (except for the purposes already stated), then its loss or destruction, like the destruction of houses on the infant's land, would obstruct or defeat the descent. The right to recover damages in the one case, as in the other, is a personal right vesting in the infant, and none but his representative succeeds at his death. Undoubtedly the heir has no claim for the destroyed houses, and why should she have to moneys lost, if they are to be traced as land merely?

But in truth the fund is but a given sum of money which itself, or in case of its loss, the substituted damages which measure its value, though its identity be lost, continues invested with the same attributes and goes to the same heir at law when reduced into possession by the person, who under the law must pursue and recover it for the benefit of the party entitled thereto.

A further suggestion may be made in regard to the interest of creditors. For the space of two years after the grant of letters of administration or testamentary, the land remains liable to debts, and is unalienable by the heir or devisee. If conveyed afterwards, the title passes, but the heir or devisee is chargeable with the proceeds of sale. During the period mentioned, and afterwards before (233) sale, the representative may by proper proceedings convert the land into assets to pay debts, and if necessary it is his duty to do so. This duty is enforced and secured by his bond. But this protection would be lost if the heir or devisee can sue and get possession of the fund into which the land has been converted and apply it to his own use; and in this respect his advantages are greater than if there had been no conversion, and to the same degree prejudicial to creditors.

The correct rule applicable to the case, in my opinion, is this: The personal representative must reduce to possession the entire personal estate, and, if necessary, sue for and recover debts and damages to which his testator or intestate may be entitled; and in an action brought for this purpose an inquiry into the source from which the funds sought to be recovered were derived is wholly immaterial and irrelevant. The only issue between the parties is as to defendant's *liability,* and in what *amount,* to the deceased or his representative, to whom the right of

action is transmitted. When the fund has been recovered, it then becomes important to ascertain whether any or what part arises from the sale of land, and who is the heir or devisee to whom, if not required for purposes of administration, it should be paid.

This is a legal proceeding to recover damages for the breach of a legal obligation, and should be conducted substantially upon the principles which govern in an action at law, modified under the new practice so far only as is necessary to secure and protect those equitable rights which formerly could only be asserted in a different tribunal. The judgment of the Court is entirely proper, reversing the decision below and transmitting the cause in order to an amendment making the heir at law a coplaintiff. So that if administration has been completed, the money recovered which represents the land may pass at once into
(234) the hands of the heir at law who is entitled to it. In this prompt and summary disposition of the whole matter in a single proceeding we have an illustration of the practical advantages of the new system over the old, under which the heir would have been compelled to seek redress by instituting a new suit in another court.

PER CURIAM. Judgment vacated and cause remanded.

Cited: Alexander v. Wolfe, 83 N. C., 273; *s. c.,* 88 N. C., 400; *Merrill v. Merrill,* 92 N. C., 668; *Howerton v. Sexton,* 104 N. C., 84; *Lafferty v. Young,* 125 N. C., 300; *McLean v. Leitch,* 152 N. C., 267.

---

(235)

STATE ON RELATION OF JOHN B. CLOMAN v. ARCHIBALD STATON AND OTHERS.

Practice—Guardian Bond—Removal of Action Brought in Improper County.

1. A guardian bond is an *official* bond within the meaning of C. C. P., sec. 65 (a).
2. An action upon a guardian bond, brought in a county other than the one wherein the bond was given, is triable in such county unless the defendant moves to remove the action to the proper county.
3. In such case, a motion by defendant to dismiss the action should be treated as a motion to remove.

SMITH, C. J., having been of counsel, did not sit on the hearing of this case.

CLOMAN *v.* STATON.

APPEAL from *Cannon, J.,* at Fall Term, 1877, of EDGECOMBE.

This was an action upon a guardian bond executed by the defendants. Upon return of the summons the defendants moved to dismiss the action for that the bond and returns of the guardian were made in the county of Martin, where the guardian qualified and resided, and insisted that the action should have been brought in Martin instead of Edgecombe. The plaintiff resisted the motion, contending that the plaintiff being a resident of Edgecombe, the venue was properly laid; and that at most the action could only be removed to Martin for trial if the defendants should move for a removal. The court being of opinion with defendants, dismissed the action, and thereupon the plaintiff asked his Honor to remove it to Martin for trial, which was refused, and the plaintiff appealed.

George Howard, Gilliam & Gatling, J. L. Bridgers, Jr., for (236) *plaintiff.*

James E. Moore for defendants.

READE, J. There is no doubt that Edgecombe, where the plaintiff lived, was not the proper county, and that Martin, where the defendant lived and gave his guardian bond, was the proper county in which to try the suit upon the guardian bond. C. C. P., sec. 68 (*a*); *Stanly v. Mason,* 69 N. C., 1; *Steele v. Commissioners,* 70 N. C., 137. A guardian bond is an "official bond" within the meaning of the statute.

In the cases heretofore before the Court, the main question was as to the proper county, but in this case the question is also made as to the time and manner of raising the question, and the party which is to raise it.

It seems that upon the return of the summons to the wrong county, the right of the defendant is "to demand that the trial be had in the proper county." If he does not so demand, then the action may go on and be tried in the wrong county. C. C. P., sec. 69.

The defendant did not move to "remove to the proper county," but his motion was to dismiss the action so that it could not be tried in either county; whereas the statute says that it may be tried in the wrong county to which it is brought unless the defendant will move to "remove to the proper county."

It is true that in the cases cited the defendant's motion was to dismiss, as in this case, and they were dismissed. But the point was not made that the proper motion was to "remove" and not to dismiss.

In *Jones v. Commissioners,* 69 N. C., 412, an erroneous report of the case puts the Court in the fault of overlooking a point in the case. The report says that there was a motion below, not only to dismiss, but to remove, and the counsel's brief says the same thing, while in the

(237) opinion of the Court it is stated that the motion to dismiss was the only point. I find in looking into the original papers that the opinion of the Court was right. The record shows that the only motion was to dismiss, and the judge's case states the same.

The object in those cases seemed to be to determine only the question as to which was the proper county. But here the point was raised and insisted on by the plaintiff that if Edgecombe was not the proper county, and Martin was, then that it ought to be removed to Martin. And that distinguishes this case from the others.

The plaintiff brought his action in Edgecombe, where he was willing to try it, and where it was triable, unless the defendant should demand that it should be tried in Martin. He did not demand that it should be tried in Martin, but objected to its being tried at all, and his Honor dismissed it. In this there was error. His Honor ought to have treated it as a motion to remove, and removed it accordingly.

The objection that the plaintiff did not move in apt time, *i. e.*, not until after the order dismissing the action, has no force in it, for the reason that the plaintiff was not obliged to move for removal at all. It was for the defendant to make that motion, and upon his failure to do so the case might have been tried in Edgecombe. Or under subdivision (1) of section 69, C. C. P., the court might have removed the case upon the suggestion of either party, or probably *mero motu*.

PER CURIAM. Reversed.

Cited: Jones v. Statesville, 97 N. C., 87; *Clark v. Peebles*, 100 N. C., 352; *McNeill v. Currie*, 117 N. C., 346; *Baruch v. Long, ibid.*, 512; *McCullen v. R. R.*, 146 N. C., 569; *McArthur v. Griffin*, 147 N. C., 550.

---

(238)

WILLIAM E. ALLEN AND OTHERS v. JOHN CHAPPELL.

County Court of Granville—Petition for Partition—Sufficiency of Petition.

Where a petition (filed by a guardian in the county court of Granville under the act of 1851-2, ch. 41) recited that the infant petitioners were tenants in common of a certain tract of land; that the same was not sufficient to be divided in kind among the petitioners without materially injuring their pecuniary interests, and that their interests would be promoted by a sale and the placing of the funds arising therefrom so that they would be productive, and prayed for a sale and that the proceeds be paid to the guardian for the maintenance and support of the infant petitioners: *Held*, that it was substantially an application for partition by sale, and within the power of the court under the act.

ALLEN *v.* CHAPPELL.

PETITION to rehear, filed by plaintiffs and heard at January Term, 1878, of the SUPREME COURT.

J. B. Batchelor and J. C. Edwards for plaintiffs.
Busbee & Busbee and Merrimon, Fuller & Ashe for defendants.

SMITH, C. J. This case was before the Court at January Term, 1877 (76 N. C., 287). We are now called upon to reconsider the decision then made, by a petition to rehear. The only error assigned is that the proceedings before the county court of Granville, under which the defendant derives title, were not for partition, and in order thereto, a sale of the infant's land, but for a sale and reinvestment of the fund, and therefore not within the jurisdiction of that court under the act of 25 December, 1852. Laws 1852-53, ch. 41.

The sufficiency of the defendant's title under these proceedings, the record of which accompanies the case as an exhibit, was the point upon which the case was disposed of in the Superior Court, and was necessarily involved in the judgment now to be reviewed. We have again carefully examined the record of the county court of Gran- (239) ville, and our opinion remains unchanged, that it constitutes a case of application for partition and sale within the jurisdiction conferred by the act. This will appear from an examination of the petition and action of that court thereon.

The petition recites that the petitioners, five in number, "are tenants in common of a small tract of land of 80 acres, mostly in forest, and has no settlement on it," and that their real estate "held by them as tenants in common is not sufficient to be divided amongst your petitioners in kind without materially injuring their pecuniary interest," and that the interest of the petitioners "would be promoted by a sale of the same and the placing of the funds arising from such sale so that they would be productive." The prayer is for a sale of the land, and that the moneys received on such sale be paid to the guardian for their maintenance and support. The court ordered the sale, the land was sold by the clerk, the sale reported and confirmed, the moneys arising from the sale paid to the guardian, and a deed of conveyance made by the clerk to the defendant. The fund was not reinvested by order of the court, nor was the court asked to make such order, but the fund was paid over to the guardian.

We think this was substantially an application for partition, and partition was made by sale as authorized by law and within the power of the county court of Granville under the act. We therefore refuse to set aside the judgment, and declare there is no error therein.

PER CURIAM. Petition refused.

(240)

LOUISA C. WELCH AND OTHERS v. E. O. MACY, ADMINISTRATOR WITH THE WILL ANNEXED OF W. B. WELCH.

Homestead—Personal Property Exemption—Minor Children.

A. dies leaving a widow and minor children (having devised his estate by will), and thereafter the widow dies, neither of them having applied for a homestead or personal property exemption: *Held*, that the minor children of A. are entitled to a homestead, but not to the personal property exemption.

CONTROVERSY without action (C. C. P., sec. 315), submitted on 16 February, 1878, to *Seymour, J.* from WAKE.

The plaintiffs are minor children applying for a homestead and personal property exemption. Their father, W. B. Welch, devised his estate after payment of his debts, and died; and their mother died soon afterwards, neither one having applied for such exemptions.

His Honor held that they were entitled to said exemptions, and ordered that the same be laid off and assigned according to law. From this judgment the defendant appealed.

Merrimon, Fuller & Ashe for plaintiffs.
W. H. Pace for defendant.

FAIRCLOTH, J., after stating the case as above: Upon these facts our decision is that plaintiffs are entitled to a homestead, but are not entitled to the personal property exemption. The statutes applicable to the case are cited and the reasons for the decision are given in *Johnson v. Cross,* 66 N. C., 167, where the same question was presented and maturely considered. A repetition of them here would be surplus work.

(241) It was urged before us that the will, being a mode of conveyance, without the wife's dissent had the effect of vesting title to the property in the creditors. Giving full force to the suggestion —the title would have vested in the creditors—*eo instanti* the homestead right attached by force of the Constitution and statutes, and then upon what principle would the creditor have the preference? But it is difficult to perceive how the testator's will, coupled with the wife's silence for a few weeks, could have the same effect as his deed, with the assent and signature of his wife, signified on her private examination, as required by Const., Art. X, sec. 8.

If the Legislature should reënact section 10 of the Homestead Act, and amend section 7 by striking out the words "as guaranteed by Article X of the Constitution of this State," a new question would arise, to wit, the power of the Legislature to extend the personal property exemption

to minors in a case like the present, or to increase the amount thereof, which would admit of discussion.

It will be certified as the opinion of this Court that the plaintiffs are entitled to have a homestead set apart, but are not entitled to a personal property exemption. With this modification, the judgment of his Honor is affirmed.

PER CURIAM. Modified.

(242)

JOHN N. BUNTING v. HENRY C. JONES, WIFE AND OTHERS.

Homestead—Purchase Money—Wife's Interest.

Where the plaintiff purchased and paid for the land in question, and had the deed made to the defendant J. under a verbal agreement that the plaintiff was to hold the deed, and that concurrently with making the deed to J., he and his wife were to execute a mortgage to the plaintiff to secure the purchase money; J. did execute the mortgage, but his wife refused to join: *Held*, that the plaintiff was entitled to judgment for the amount due, and that the land be sold to satisfy it. *Held further*, that in such case no title vested in J., and his wife acquired no dower or homestead rights. *Held further*, that plaintiff's demand is for the purchase money, as against which homestead rights do not prevail.

APPEAL from *Buxton, J.*, at June Special Term, 1877, of WAKE.

This action was brought to recover the purchase money for a house and lot in the city of Raleigh, and the defendants objected to the judgment rendered for the plaintiff in the court below, for that it was adjudged that the title to the same (which came to them in the manner set forth in the opinion of this Court) was not in the defendant Jones, and that the premises be sold to satisfy the debt; and insisted that the judgment should have been only for the recovery of the debt. And from said judgment the defendants appealed.

George H. Snow for plaintiff.
T. M. Argo and Battle & Mordecai for defendants.

READE, J. The plaintiff purchased and paid for the land in question and had the deed made to defendant Henry C. Jones, under a verbal agreement that the plaintiff was to hold the deed, and that concurrently with the taking the deed from the vendor to the defend- (243)
ant Henry C. Jones, he and his wife were to execute a mortgage deed to the plaintiff, to secure the purchase money. The defendant

Henry C. Jones did execute the mortgage deed and delivered it to the plaintiff, but his wife, the *feme* defendant, refused to join; and this action is brought to recover judgment for the purchase money, and to have the land sold to satisfy it.

The plaintiff is entitled to his judgment and sale.

The defendants object to the sale for the reason that the deed which was made to Henry C. Jones vested the title in him, although but for a moment, and thereby his wife, the *feme* defendant, became invested with dower and homestead rights. This is not so, for two reasons:

1. The deed from the vendor to Jones, and his mortgage to the plaintiff, were to be, and were, concurrent acts. And concurrent acts are to be considered as one act. The title did *vest,* but it did not *rest,* in Jones, but "like the borealis' race, that flits ere you can point its place." And it was as if the title had passed directly from the vendor to the plaintiff. But even if this were not so, and if the deed had been made and delivered to Jones, and he had made no mortgage to plaintiff, yet under the agreement aforesaid, and the plaintiff's money having paid for the land, there would have been an equity in the plaintiff which would have entitled him to call for the legal estate, unaffected by dower or homestead. It was not intended to give the defendant the land, and he paid nothing for it. How, then, can he or his wife claim it? But if this were not so, still—

2. The plaintiff's demand is for the purchase money, as against which homestead rights do not prevail.

The defendants insist that the plaintiff did not pay the purchase money, and thereby become substituted to the rights of the vendor; but that he (plaintiff) loaned the defendant the money with which to pay it, and that the plaintiff's demand is for an ordinary debt. But (244) the fact is stated to be otherwise.

We have not mentioned the intervention of Sion H. Rogers, as it was not necessary for elucidation.

PER CURIAM. Affirmed.

Cited: Moring v. Dickinson, 85 N. C., 469; *Burns v. McGregor,* 90 N. C., 225; *Sawyer v. Northan,* 112 N. C., 267; *Belvin v. Paper Co.,* 123 N. C., 145; *Weil v. Casey,* 125 N. C., 359; *Rhea v. Rawls,* 131 N. C., 454; *Sutton v. Jenkins,* 147 N. C., 15; *Hinton v. Hicks,* 156 N. C., 25; *Gann v. Spencer,* 167 N. C., 431; *Trust Co. v. Sterchie,* 169 N. C., 23.

WILLIAM SPOON AND OTHERS v. GEORGE W. REID AND OTHERS.

Homestead—Fraudulent Conveyance—Practice—Allotment of Homestead.

1. Where a debtor had conveyed the tract of land upon which he lived, in fraud of creditors, and afterwards the sheriff set apart to him under execution two other tracts of land as a homestead and sold the home tract, and the purchaser acquired possession thereof: *Held*, in an action by the debtor to recover possession of the home tract as a homestead, that he was not entitled to recover. Nor would he have been entitled to recover if the home tract had not been fraudulently conveyed or conveyed at all.
2. An allotment of homestead under execution, without exception or appeal by the debtor, is an estoppel of record against him.

ACTION for possession of land, tried at Spring Term, 1877, of RANDOLPH, before *Cox, J.*

The plaintiff owned a tract of land on which he lived, and two other small tracts not connected therewith. He conveyed the tract on which he lived to his daughter to defraud his creditors. A creditor sued him, got judgment, the sheriff had his homestead laid off in the two small tracts, levied on the home tract as excess over the homestead, sold the same, and title from the sale came to the defendant, who sued the plaintiff and recovered possession. The plaintiff bringing this action to recover the home place, upon the ground that he is entitled (245) to a homestead therein.

Under the instruction of the court, the jury rendered a verdict for the plaintiffs. Judgment. Appeal by defendants.

J. A. Gilmer for plaintiff.
A. W. Tourgee and J. N. Staples for defendant.

READE, J., after stating the case as above: The statement shows that he ought not to have it, yet the homestead law has so much favor that the grossest frauds are practiced in its name without shame.

Without affecting the conclusion at which we have arrived, it may be conceded that he had never conveyed his home place in fraud, nor at all, but that he owned it and lived upon it at the time of the levy and sale, and yet he could not recover; for when the allotment was made to him in the other two tracts by the sheriff's appraisers, and he took no exception thereto and no appeal therefrom, and disclaimed title to the home place and claimed no homestead therein, he assented to and was bound by the allotment; and the same is an estoppel of record against

him. He has his homestead regularly allotted to him; and having that, he cannot claim another. Let him not trifle with the law.

The plaintiff's claim is founded upon the idea that an allotment of homestead which does not embrace the home place or house in which he lived is a nullity, and that therefore he is not estopped by the allotment in this case. But that is not so. Surely the sheriff is not obliged to lay off to a defendant the house in which he lives, if it is not his property. Nor is it proper for him to do it if the defendant disclaims property, although he might not be bound by his disclaimer, and (246) might subsequently claim it. So the Constitution provides that, "in lieu of" the dwelling, "any lot in a city, town, or village, at the option of the owner," may be allotted. And when he disclaims title to the dwelling, and his homestead is laid off in the only land that he does claim, and he makes no exception thereto, then it is "in lieu of the dwelling" and is "at his option," tacitly if not avowedly manifested. A defendant is entitled to have his dwelling allotted to him if he desires it; but if he does not want it, then it is a favor to him to have it allotted elsewhere.

Error.

PER CURIAM. *Venire de novo.*

Cited: Burton v. Spiers, 87 N. C., 90; *Welch v. Welch,* 101 N. C., 570; *McCanless v. Flinchum,* 98 N. C., 368; *McCracken v. Adler, ib.,* 403; *Hughes v. Hodges,* 102 N. C., 263; *Whitehead v. Spivey,* 103 N. C., 70; *Springer v. Colwell,* 116 N. C., 523; *Gudger v. Penland,* 118 N. C., 834.

Distinguished: Gheen v. Summey, 80 N. C., 189; *Marshburn v. Lashlie,* 122 N. C., 241; *Oates v. Munday,* 127 N. C., 446; *Cox v. Boyden,* 153 N. C., 525.

---

(247)

CITIZENS NATIONAL BANK v. L. M. GREEN AND WIFE.

Homestead—Income Therefrom—Personal Exemption—Husband and Wife.

1. A husband cannot loan money to his wife, both being insolvent.
2. All property is held subject to the payment of the debts of the owner, except in so far and to the extent only that it has been specifically exempted.
3. The homestead law does not vest in the owner any new rights of property; it only imposes a restriction upon the creditor that in seeking satisfaction of his debt he should leave to the debtor untouched $500 of his personal and $1,000 of his real estate.

4. The income derived from a homestead is not likewise exempt from liability for the owner's debts, and all acquisitions of property derived from such income are subject to sale under execution against the debtor; and the same is true of the natural increase of personal property set apart to the debtor as exempt from sale under execution.

5. G. being insolvent and having had his homestead of the value of $1,000 set apart to him, and his personal exemption to the value of $275.50 allotted, loaned his wife $300, being the proceeds of the sale of cotton raised on the homestead; with it (and $200 belonging to her) the wife purchased certain other real estate, taking the title to herself; in an action by a judgment creditor to subject the land to the payment of his debt, it was *Held*, that the creditor had a lien upon three-fifths of the land under and by virtue of his judgment against G.

RODMAN, J., dissenting.

CIVIL ACTION, tried at Spring Term, 1877, of WAKE, before *Buxton, J.*

The case states: The plaintiff had heretofore obtained and docketed a judgment against defendant L. M. Green, at June Term, 1875, of said court, for $2,132 as security for C. B. Harrison. Execution issued thereon, and on 3 November, 1875, his personal property exemption to the value of $275.50, and his homestead to the value of $1,000 were allotted to the defendant; but he appealed from the allot- (248) ment of the real estate as homestead, and thereupon a reallotment was made on 22 November, 1875, assigning him as homestead two tracts of land of the value of $1,000—one of 65 and the other of 130 acres—the latter tract having upon it a crop of cotton unmatured.

The execution was returned unsatisfied, and on 26 January, 1876, the plaintiff commenced this action to subject his interest in a certain other tract of land, alleged to have been bought by him in July, 1875, of one Dean, and which was not embraced in his homestead exemption, to the payment of the plaintiff's debt.

It was also alleged that at the time of this purchase the defendant was indebted to the plaintiff, and that he had the deed executed to his wife to conceal his interest in the land and to defraud his creditors. The defendant, however, denied the complaint, and alleged that the land was bought and paid for by his wife on her own account, and with funds which she had borrowed from him, and that the transaction was a fair and *bona fide* one.

Upon issues submitted, the jury found that the said land was bought by the defendant's wife, and that three-fifths of the purchase money was paid by the defendant, her husband, which was the proceeds of the sale of property exempt from execution, to wit, the money derived from the sale of the cotton raised on the said 130-acre tract.

The defendant's counsel asked for the following instructions to the jury: (1) If the jury shall find that the $300 advanced by the defend-

ant to his wife were the proceeds of the sale of a part of his real estate exemption, then he had the right to give the same to his wife. (2) If the $300 were a part of said exemption, then he had a right to exchange it for other land of like value, and the land received in exchange would be protected from creditors.

His Honor declined to give the instructions, but told the jury, among other things, that according to the evidence the money was ad-
(249) vanced by the defendant as a loan to his wife, and that if this was so, it was still his, for the law did not recognize such dealings between a husband in embarrassed circumstances and his wife; that the cotton upon the homestead at the time of its allotment passed to the defendant as a part of the realty, and that after it was gathered and sold, the proceeds became personal property, liable to claims of creditors, unless set apart as personal property exemption according to law.

Upon the verdict his Honor adjudged the defendant wife a trustee for defendant husband, in respect to three-fifths of said land, upon which the plaintiff had a lien by virtue of the said judgment, etc. From this ruling the defendant appealed.

Merrimon, Fuller & Ashe, and Battle & Mordecai for plaintiff.
D. G. Fowle and Busbee & Busbee for defendant.

BYNUM, J. A homestead in land to the maximum value allowed by law had been duly allotted to the defendant L. M. Green. A crop of cotton was then growing upon it, which, when matured and gathered, he sold, and of the proceeds undertook to lend $300 to his wife, who, with that sum and $200 more which she procured from her sister, purchased the land in question with the privity of the husband and had the deed executed to herself.

Is this land or any part of it exempt from the debts of the husband? The husband and wife were insolvent. The husband could not by law make the contract of loan to his wife, so the money advanced to his wife was still his money, and the case stands as if he himself had directly put that much cash into the purchase of the land, and so also a court of equity will treat the transaction to the extent of his advances
(250) as if the deed had been made directly to the husband.

It is not material to inquire whether the crop growing upon the homestead at the time it was assigned was valued as a part of the homestead; that does not distinctly appear, and we assume that it was not, and could not be, so estimated. Nor is it material to inquire whether a crop grown upon the homestead after it had assumed the character of personal property is exempt from the debts of the owner, as to the excess above the exemption allowed by law. It is certain that the

debtor is always entitled to the maximum of his personal exemption, and that by so much of this exemption as may be consumed in producing a crop, by that much may he be reimbursed out of the crop produced, so as to maintain the exemption to the maximum standard fixed by law. In respect to the homestead, it has been held in other States having similar laws, that if it should depreciate in value below $1,000 by the burning of the buildings upon it, a fall of prices, or other casualty, the owner would be entitled to a reallotment out of any subsequently acquired land, so as to bring the homestead up to the maximum. So, on the other hand, if the homestead should appreciate in value by a rise in prices, the erection of costly buildings, or other improvements, the creditors would be entitled to a reassessment and reallotment, so as to reach the excess over the value fixed by law. It was so held in Illinois, in *Haworth v. Travis,* 67 Ill., 301, and in *Stubbleford v. Graves,* 50 Ill., 103, where the Court put this case: "Suppose nine years ago a tract of land containing 10 acres, part of a large tract near the city limits of Chicago, had been valued and set off as a homestead, it being then of the value of $1,000, and on the land the resident head of the family had erected costly buildings and improvements, by means of which and the rise of property in that locality its value should now greatly exceed $1.000: by what principle of law or justice could the claimant insist upon holding the land as a homestead, when one-tenth of (251) the tract would fully satisfy the homestead right? . . . A debtor being unable to pay his debts has no right to a homestead of greater value than $1,000. By securing one to him of that value, his rights are satisfied and the requirements of the law fulfilled." To the same effect is 37 Cal., 175. These authorities are cited to show what has been the construction of the courts upon similar homestead provisions in other States, and not as an expression of the opinion of this Court upon a grave question which is not fully presented by the facts of this case.

A single proposition before us is, What is the status of the additional tract of land purchased by the husband, who already has a homestead of the maximum value allotted and set apart by metes and bounds?

This question must be determined by our own legislation, for if it is exempt from the debts of the owner, it must be either by some constitutional or some statutory provision. We look in vain for either.

By Article X, sec. 2, of the Constitution it is provided "that every homestead and the dwelling and buildings used therewith, not exceeding in value $1,000, . . . shall be exempt from sale under execution or other final process." By chapter 44, Bat. Revisal, it is made the duty of the sheriff having an execution in his hands to levy upon all the property of the debtor, real and personal, except the homestead and personal

exemption as provided in the Constitution and the statutes. And by chapter 55, Bat. Revisal, it is provided that whenever the real estate of any resident of the State shall be levied on by virtue of an execution or other final process obtained on any debt, the sheriff shall cause the homestead to be appraised and set apart by *metes* and *bounds,* not exceeding in value $1,000, and then to levy upon the excess.

The language of the law is so plain that there is no room for construction; that is, that all the real estate of the debtor, except that
(252) which is specifically set apart as the homestead, is the subject of seizure and sale under an execution or other final process. No provision of the Constitution or of the statutes supplementary thereto furnishes the ground of a doubt. On the contrary, their legal effect is simply to protect the occupant in the enjoyment of the land set apart as a homestead, unmolested by his creditors.

They make no provision and contemplate none for the owner, from the homestead or any other source of income, to acquire additional lands and estates which shall be protected from his debts, just as his homestead is secured. The courts cannot by judicial legislation even do so bold a thing as to confer new rights and exemptions in the face of plain legislation by the lawmaking power. It is urged in argument that a homestead having been secured to the debtor by law, all income derived from its use is merely an incident which follows the principal and belongs absolutely to him, and may be used either in improving the property or in other investments; and that unless this be so, the law rather discourages than invites improvement on enterprise, by cutting off all inducement to industry, the legitimate rewards of which when in excess of the exemption would be seized and sold by the creditor.

Such an argument should not be addressed to a court, which cannot make, but only construe and administer the law as it is written. If worthy of consideration, it should be directed to the Legislature as a reason for changing the law.

There is some misconception as to the nature of the homestead law. The homestead is not the creation of any new estate, vesting in the owner new rights of property. His dominion and power of disposition over it are precisely the same after as before the assignment of homestead. The law is aimed at the creditor only, and it is upon him
(253) that all the restrictions are imposed; and the extent of these restrictions is the measure of the privileges secured to the debtor; and these restrictions imposed on the creditor are that in seeking satisfaction of his debt he shall leave to the debtor untouched $500 of his personal and $1,000 of his real estate.

With this limitation upon the rights of the creditor, it is manifest that all the obligations of the debtor to pay his debts, and all his rights

to acquire and dispose of property, are the same after as before the assignment of homestead.

The homestead has been called a determinable fee, but as we have seen that no new estate has been conferred upon the owner, and no limitation upon his old estate imposed, it is obvious that it would be more correct to say that there is conferred upon him a determinable exemption from the payment of his debts in respect to the particular property allotted to him. By the recent act of the Legislature (Laws 1876-77, ch. 253) this determinable exemption has been extended into a fee simple, and the homestead is now forever exempted from all liability for the debts of the owner contracted after the ratification of the act, if the act be constitutional. In the face of this, it is still insisted that all after-acquired property derived from the income of the homestead is exempt from the debts of the owner. Suppose A. has had assigned to him his homestead and personal exemption, and by good management he has acquired other lands of the value of $10,000, and other personal property of the value of $5,000. It is asked, Why should not these acquisitions belong to him as the natural fruit and product of the exempted property? The answer is, They do, undoubtedly. No one disputes that proposition; on the contrary, it is the very proposition we affirm. All such property does belong to him absolutely, and with it he may buy and furnish fine houses, have his carriage and horses, supply his table with the costliest luxuries. But when he refuses to pay the butcher, the latter might well exclaim:

"Upon what meat doth this our Cæsar feed, (254)
That he is grown so great?"

As in respect to land, so as to the personal exemption: Suppose B. has had assigned to him as a part thereof stock, cattle, or brood mares. It is again asked, Do not the increase belong to the owner of the dams? Undoubtedly. *Partus sequitur ventrem,* and he may increase the stock by continued production and reproduction to an unlimited extent and value, and it would still be all his absolutely. But the question is, What sanctity distinguishes and protects this new wealth which is not equally vouchsafed to the same kind of property belonging to other men?

Again, suppose A., having accumulated out of the homestead other lands of the value of $10,000, dies, leaving a child. Under the law of 1876-77, this land would descend as a homestead, and all the additions made to it by the heir would also be homestead, and so *ad infinitum* exempt from the debts of all the proprietors.

If the construction of the law should be that all acquisitions of property are exempt from execution, it would be the interest of all men at once to take the benefit of the homestead, as well the rich as the poor,

for thereby all income derived from it could be capitalized and recapitalized from that one nucleus to the building up of colossal fortunes in defiance of debts past or future. And what a door would be opened to frauds and perjuries, as each owner of a homestead would be tempted to allege and establish that all his estate, no difference how acquired, was but the increment of his own or the homestead of some remote ancestor!

It would be a fruitless endeavor in the creditor to investigate and sift out and separate the homestead from the nonhomestead property, thus confused and confounded. In the progress of time, of course, (255) such intricate and perplexing investigations must pass from the hands of creditors and attorneys to those of the antiquarian until all credit perish.

Such a construction would come in direct conflict with the bankrupt law, for by it only past debts are discharged, while by the homestead law both past and future debts would be practically discharged. The bankrupt's future acquisitions are liable for future debts, while those of the owner of the homestead would not be, and one result of the anomaly would be to transfer the collection of all foreign claims from State to Federal courts, where a law so plainly impairing the obligation of contracts would not be recognized.

Such, however, is not the proper construction of the homestead law in this State or any other of our sister States. It is a mistake to suppose the exemption laws are something new in North Carolina, or that their construction has not long been settled. The present law differs in no material respect from that enacted as early as 1773, except that it is more enlarged, and extends to lands as well as personal property. By that law, amended and enlarged in its operations from time to time as finally embodied in Rev. Code, ch. 45, secs. 7, 8, 9, certain property was exempted from sale under execution, such as a limited quantity of provisions, household articles, cow and calf, etc.

It was never held, that we are aware, that the increase derived from these exemptions—as, for example, a stock of cattle raised from the cow and calf—was exempt from execution. And in order that the allotment might be perpetuated for the protection of both debtor and creditor, commissioners were appointed to lay off and assign to the debtor such property as he was entitled to under the acts, and a list thereof was required to be made out and filed among the records of the county court.

Such proceedings are substantially required under the present (256) homestead laws; yet no one supposed that under the old law the debtor was entitled to anything more than what was thus set apart. The rule of law then was, and we think now is, that all of a man's property was and is held subject to the payment of his debts,

except in so far and to the extent only that it has been specifically exempted. The practical working of this law is not always without its difficulties, as, for instance, where the value of the homestead and personal exemption may have been increased by building, the rise of values, or successful crops, or have been diminished in value by opposite causes. Our case is not one of that kind, and demands of us no opinion of what would be the rule of adjustment and liability in such cases, and we give none. Cases of the kind will not be frequent where the excess over the maximum allowance will be so clear and palpable as to provoke litigation on the part of the creditor, and when such cases arise, they must be adjusted by the good sense of the parties, or, like all other inconceivable differences, by the arbitrament of the law.

It is not from a construction of the law at once just to the creditor and debtor that the latter has cause of apprehension. His danger is in another direction—the frail and evanescent tenure of the homestead itself. Though bestowed, it is not preserved to him. The benevolent purpose of its creation was to save the improvident and their families from the consequences of their imprudence. It is manifest that this purpose fails, and that there is an incongruity between the object and end, so long as the debtor is allowed first to encumber and next to part with what was intended as a provision for himself and family. It cannot be disputed that real and chattel mortgages, liens and encumbrances of all kinds, to an unparalleled extent, now cover a large portion of the real and personal property of the State, and that they are generally confined to that class of our population who are theoretically supposed to be enjoying the benefit of the homestead law. It is not so much the excess over the legal exemptions that needs protection, for there is but little of it; but it is the homestead itself that needs (257) protection.

Exemption laws, without diminishing the need of credit, have naturally made credit more precarious and insecure, and as a result have proportionately increased the premium which must be paid for it; so that at few periods of our history has interest been higher or borrowed money less remunerative than now, and at no former period has the debtor class been more under the dominion of the merchant, grocer, and capitalist. From the condition of things as society is organized, the poor, the needy, and the improvident will borrow if they can, and will not hesitate to sell or encumber their homesteads upon ruinous terms, and the beneficent intentions of the law for their benefit are thus defeated. Whether this result has proceeded from insufficient or misguided legislation, from the habits of the people, or from a combination of all these causes, will admit of different opinions as men view the situation from a moral or political standpoint.

In respect to the case before us, it remains for the Court to declare its opinion to be that by the unambiguous words of the Constitution and laws pursuant thereto the defendant L. M. Green is entitled to no other land exempt from his debts than the homestead which has been appraised and set apart to him. And in the language of a great judge upon the construction of the statutes: "It is the duty of all courts to confine themselves to the words of the Legislature, nothing adding thereto, nothing diminishing. The consequences, if evil, can only be avoided by a change of the law itself, and not by judicial action. Sedgwick on Stat. and Const. Law, 205 to 220.

The exceptions to the evidence excluded, taken by the defendants, are untenable, and the rulings of the court below are sustained.

(258) PER CURIAM. Affirmed.

Cited: *Murphy v. McNeill,* 82 N. C., 224; *Simpson v. Wallace,* 83 N. C., 489; *Burton v. Spiers,* 87 N. C., 94; *Markham v. Hicks,* 90 N. C., 205; *Morris v. Morris,* 94 N. C., 617; *Campbell v. White,* 95 N. C., 345; *McCanless v. Flinchum,* 98 N. C., 368; *Jones v. Britton,* 102 N. C., 175, 180, 182, 191, 198; *Hughes v. Hodges, ib.,* 259; *Tucker v. Tucker,* 108 N. C., 237; *VanStory v. Thornton,* 112 N. C., 208, 219; *Stern v. Lee,* 115 N. C., 442; *Thomas v. Fulford,* 117 N. C., 679; *Bevan v. Ellis,* 121 N. C., 235; *Joyner v. Sugg,* 131 N. C., 327, 346; *s. c.,* 132 N. C., 593; *S. v. Cole, ib.,* 1079; *Sash Co. v. Parker,* 153 N. C., 134; *Fulp v. Brown, ib.,* 533.

THOMAS B. LYON v. WILLIAM E. AKIN AND WIFE, LYDIA.

Husband and Wife—Purchase of Real Estate with Wife's Separate Property—Resulting Trust.

1. Where land is purchased by a husband with his wife's money, the proceeds of the sale of her real estate, and title is taken to the husband alone, a resulting trust is created in favor of the wife, and a purchaser from the husband with notice stands affected by the same trust.
2. Where in an action to recover land it appeared that the husband of the *feme* defendant had (before the enactment of the Rev. Code, ch. 56) purchased land partly with money arising from the sale of real estate belonging to his wife, and had taken title to himself, and thereafter conveyed the land to the plaintiff, who purchased with notice of the wife's interest therein: it was *Held,* that the plaintiff was entitled to recover possession of the land and its profits for the life of the husband, and in fee to the extent of the residue of the purchase money not the proceeds of the wife's land.
3. The act of 1860, first extra session, ch. 16 (known as the first Stay Law), is unconstitutional and void.

LYON *v.* AKIN.

ACTION to recover possession of land, tried at Spring Term, 1877, of GRANVILLE, before *Buxton, J.*

The defendant Lydia was one of the heirs at law of John (259) Ferrill, who died in 1846, seized of real estate, which descended to Lydia and her brothers and sisters as tenants in common. The defendant W. E. Akin and the said Lydia intermarried in March, 1846, she being then 17 years of age. In July, 1848, the husband purchased the land in suit for the sum of $218, taking to himself a deed in fee therefor, and in 1850 paying for it with his wife's money. Of this money, $150 was derived from the sale of her land for the purposes of partition among the tenants in common. On 23 July, 1861, the husband conveyed this land to the plaintiff in mortgage to secure debts due to him. At the time the land was purchased by the defendant, and also at the time the mortgage deed was executed to him, the plaintiff had notice that the said land had been purchased and paid for by the defendant with the proceeds of the sale of the wife's land. The mortgage was not registered until August, 1869. The husband and wife had issue living. The mortgage was foreclosed in 1870, by a sale and the purchase of the lands by the plaintiff, who immediately went into possession and occupied the premises until 1875, when the defendants entered. The action is brought to recover the possession and damages.

His Honor gave judgment *non obstante veredicto* for the plaintiffs, and the defendants appealed.

Edwards & Batchelor and E. G. Haywood for plaintiff.
Busbee & Busbee for defendants.

BYNUM, J., after stating the facts as above: The plaintiff is entitled to recover. When real estate belonging to an infant or *feme covert* has been converted into money by a sale under decree of court for a division, the fund will continue to have the character of realty until a different character is impressed upon it by some act of the owner. (260) *Jones v. Edwards,* 53 N. C., 336. And where land has been purchased with the wife's money, the proceeds of the sale of her real estate, although the deed be taken to the husband alone, a resulting trust is thereby created in favor of the wife, whose money paid for the land, and the purchaser from the husband with notice stands affected by the same trust. *King v. Weeks,* 70 N. C., 372; *Maxwell v. Wallace,* 45 N. C., 251; Adams Eq., 33. The plaintiff, therefore, who thus purchased from the husband with notice, thereby became a trustee to the extent of the money thus furnished, and holds the land just as the husband held it. What, then, was his interest in it?

It will be observed that the purchase by the husband was in July,

1848, before Rev. Code, ch. 56, was enacted, whereby all real estate belonging at the time of marriage to females, married since the third Monday of November, 1848, is prohibited from being sold or leased by the husband for the term of his own life, or any less term of years, except by and with the consent of the wife ascertained by her privy examination. The husband, therefore, by virtue of his marital rights, was seized of an estate during coverture, and by the subsequent birth of issue became seized for his own life as tenant by the curtesy initiate. His deed of mortgage and the subsequent purchase by the plaintiff under the foreclosure proceedings vested the plaintiff with the estate for the life of the husband, and with a resulting trust at his death to the wife (or her heirs, if she does not survive him) to the extent of the purchase money she furnished. The plaintiff is therefore entitled to the possession of the land and its profits for the life of the husband, and in fee to the extent of the residue of the purchase money, not the proceeds of the sale of the wife's land.

It was further contended by the defendants that the mortgage to the plaintiff having been executed subsequent to the act of 11 May,
(261) 1861 (known as the first Stay Law), was by section 7 of that act made illegal and void. This section provided: "That all mortgages and deeds in trust for the benefit of creditors hereafter executed, whether registered or not, and all judgments confessed during the continuance of this act, shall be utterly void and of no effect."

The constitutionality of this act came directly in question soon after its passage, in *Barnes v. Barnes,* 53 N. C., 366, and it was held to be unconstitutional and void as to section 3, which forbids the trial of causes in the courts of justice. The reasoning of the Court was directed to the validity of the act as an entirety, and since that decision the whole act has been treated as unconstitutional and void. It was certainly as incompetent for the Legislature to declare that a debtor should not pay his debt, or secure it by the transfer of property to the creditor, as to forbid a creditor to sue and recover judgment for his debt. See, also, *Harrison v. Styres,* 74 N. C., 290; *Jones v. Crittenden,* 4 N. C., 55; *Hoke v. Henderson,* 15 N. C., 1.

PER CURIAM. Affirmed.

Cited: Hall v. Short, 81 N. C., 277; *Cunningham v. Bell,* 83 N. C., 330; *Osborne v. Mull,* 91 N. C., 206; *Thurber v. LaRoque,* 105 N. C., 307; *Kirkpatrick v. Holmes,* 108 N. C., 209; *Beam v. Bridgers, ib.,* 278; *Brisco v. Norris,* 112 N. C., 676; *Houck v. Somers,* 118 N. C., 612; *Butler v. McLean,* 122 N. C., 358; *Faggart v. Bost, ib.,* 520; *Wilson v. Jordan,* 124 N. C., 709; *Greene v. Owen,* 125 N. C., 215; *Toms v. Flack,* 127 N. C., 423.

(262)

REUBEN J. HOLMES, TRUSTEE, v. JOSEPH MARSHALL.

Deed of Trust—Possession of Trustee—Presumption of Fraud—Rebuttal.

1. The presumption of fraud arising upon a deed of trust, executed by an insolvent person to secure one of his creditors, conveying a storehouse and lot, a stock of goods, and the increase of such stock, and containing a provision that the trustor "shall have the privilege of continuing his business for one year," is not rebutted by proof that the debt secured by the trust deed is a *bona fide* debt, and that the insolvency of the trustor was unknown to the trustee and *cestui que trust* at the time of the execution of the deed.
2. In such case the presumption of fraud arises from the *fact* of the debtor's insolvency, and the further *fact* that the trustee and *cestui que trust* are parties to a deed of trust which secures a benefit to the maker, and which conflicts with the rights of creditors.

APPEAL from *Seymour, J.*, at Fall Term, 1877, of STANLY.

This was an action to recover the value of a stock of goods seized and sold by the defendant as sheriff of Stanly County, to satisfy two executions in his hands, one in favor of White, Rosenburg & Co., and the other in favor of Sands, Small & Bash. The plaintiff claimed title by virtue of a deed to him, as trustee, executed by the firm of Ridenhour & Misenheimer, who were defendants in the said executions. The deed conveyed to the trustee the storehouse lot, together with the entire stock of goods and the increase of said stock, "the said firm having the privilege of continuing their business for one year," to secure a debt to Foster, Holmes & Co. The said firm were insolvent at the time they made said trust deed; the debt to the plaintiff was a *bona fide* one, secured by the deed, but never paid by said firm in accordance with the terms of the deed. It appeared from the evidence of the plaintiff that he had no notice or knowledge of the indebtedness of the trustors at the (263) time of the execution of the deed.

His Honor charged the jury that the deed under which the plaintiff claimed was such a one as to raise a presumption of fraud, and that the *onus* was on the plaintiff to show the *bona fides* of the same; that this was not done by his simply showing that he did not know of the indebtedness of the firm; conceding that there was no evidence of any collusion in fact between them, the *onus* still rested on the plaintiff to support the deed by evidence of nonindebtedness—as by showing that their other property, not included in the deed, was sufficient to pay their debts, or by other sufficient evidence; but that in this case the court holds that there was no evidence sufficient to rebut the presumption of fraud raised

by the law upon the deed. Under these instructions the jury rendered a verdict for the defendant. Judgment. Appeal by plaintiff.

J. M. McCorkle, A. W. Haywood, and W. G. Burkhead for plaintiff.

T. S. Ashe, W. H. Bailey, Battle & Mordecai, and T. P. Devereux for defendant.

BYNUM, J. In *Cheatham v. Hawkins,* 76 N. C., 335, this Court said:

"If there were other unsecured creditors at the time of this (264) assignment, and no other property of the debtor than that conveyed in the mortgage, out of which the creditors could make their debts, the fraudulent intent would seem to be irrebuttable. A clear benefit is secured to the debtor, and a clear right is withheld from the creditor, beyond what the law permits. An assignment cannot cover up and preserve the property for the debtor's use, or protect it from the remedies and demands of the creditors. Here is not only a retention of possession by the assignor which raises the presumption of fraud, but there is reserved the further power to dispose of it for the debtor's benefit, and, still more, the exercise of that power annihilates the thing itself."

The plaintiff, in the case before us, testified that at the time of the execution of the deed of trust to him he had no notice or knowledge of the fact of the indebtedness of the trustors. His Honor held that this was not sufficient evidence to rebut the presumption of fraud which the law raised upon the deed. We think it was no evidence. The presumption of fraud here is not affected by the ignorance of the plaintiff of the insolvency of the trustors at the time of the execution of the deed; but the presumption is raised by the *fact* of their insolvency, and the further fact that the plaintiff is a party to a deed of trust which secures a benefit to the makers, and which conflicts with the rights of creditors. In fact, there were other creditors of the vendors at the time the deed was executed. The advantages reserved to the debtors in the deed were to the prejudice of those creditors, and as the plaintiff was a party to the deed, he is presumed to have intended the probable consequences of his act. It was either his duty not to have taken such a deed, or, taking it, to have first known that there were no creditors to be prejudiced by it.

PER CURIAM. No error.

Cited: Cheatham v. Hawkins, 80 N. C., 165; *Booth v. Carstarphen,* 107 N. C., 400; *Grocery Co. v. Taylor,* 162 N. C., 311.

(265)

ANNE E. GREEN AND OTHERS v. WILEY D. JONES AND OTHERS.

Trustees—Attorney's Fees—Commissions—Practice—Referee's Report.

1. The defendant J. purchased certain lands of G. (sold under a deed of trust) at the request of G. for the benefit of his daughters, with money borrowed with G.'s knowledge at 1½ per cent interest monthly; afterwards a contract was entered into in which J. agreed to resell the land, and that if on such sale he should realize any profit after paying the purchase money, costs, and charges, etc., he would hold the same for the use and benefit of the said children of G.; J. thereafter sold the lands and realized more than sufficient to reimburse himself; for services in relation to the purchase, sale, etc., J. paid an attorney $500. In an action for an account and settlement brought by the daughters of G., it was *Held*, (1) That the sum of $500 was excessive, and J. was entitled to credit for only $200. (2) That under the contract he was not entitled to commissions. (3) That he was entitled to credit for the amount paid as interest at 1½ per cent from the time the money was borrowed to the sale of the lands by him. (4) That he was not entitled to credit for money paid to G. for articles furnished by G. to his daughters while living with him.
2. If there is *no* evidence to support the findings of fact reported by a referee, they will not be sustained. They are presumed to be right unless *shown to be wrong.*

APPEAL from *McKoy, J.*, at January Special Term, 1878, of WAKE.

This was an action by the plaintiffs against the defendants for an account and settlement of a trust fund, heard upon exceptions to the referee's report, which stated, among other things, that defendant Jones on 30 October, 1869, bought certain lands (at a sale by a trustee), the property of W. A. Green, the father of plaintiffs, at the request of Green, and for the benefit of plaintiffs, with money ($2,200) which he borrowed from the State National Bank of Raleigh (at the request and to the knowledge of Green, at the rate of 1½ per cent per month, (266) which interest Jones paid to the bank), and with other moneys borrowed of other persons; that on 1 April, 1870, a contract was entered into between Green and Jones, in which Jones agreed to cut up and resell said lands, and "that if on sale of the same he shall realize any profit after paying the purchase money, costs, and charges he may have been or hereafter may be at by reason of such purchase, he will hold the same for the use and benefit of the said children of W. A. Green," and said Jones in October following realized enough from the sale of said land to fully reimburse himself; and the referee allowed the defendant Jones 5 per cent commissions on the amount of the purchase money, and credit for $200 as a fee paid to T. B. Venable, Esq., for professional services rendered concerning the purchase and sale of the lands and preparing

deeds, etc.; that defendant kept no account of disbursements, except his own charges, and was frequently called on by the plaintiffs to render a statement of his account of the fund; that in 1872 the defendant invested $2,000 of the fund in the purchase of a house and lot in Raleigh for the benefit of plaintiffs, and took the deed therefor in their names; that Venable collected $100 rent due Green before the first sale of the land and paid the same to Green at the request of Jones; that sundry articles were furnished to Green on his individual account (which were allowed as a credit to defendant), and also necessaries to the plaintiff Sally Green in 1858, while living with Green as a member of his family and supported by him; that Jones received the moneys belonging to said fund, and that he is due the plaintiffs the sum of $1,789.28, with interest on $1,688 from 7 January, 1878.

Plaintiff's Exceptions:

1. That the amount of $200 allowed T. B. Venable is excessive.

2. That the amount allowed defendant as commissions is excessive and also contrary to his agreement to charge only his expenses. (267)

3. That the allowance of the cash items in the account is not warranted by the weight of the evidence.

Defendant's Exceptions:

1. That referee finds as a conclusion of law that defendant is only entitled to credit for one installment of interest at 1½ per cent per month on $2,200, whereas upon the facts he is entitled to credit at said rate on said amount from the time it was borrowed to the time the defendant was reimbursed by a resale of the land.

2. That defendant is not allowed credit for full amount ($500) paid T. B. Venable for professional services.

3. That defendant is not allowed credit for $124 paid to W. A. Green for support of family while plaintiffs lived with him.

Exceptions overruled, and judgment according to report of referee, from which both parties appealed.

A. M. Lewis and Gray & Stamps for plaintiffs.
Battle & Mordecai for defendants.

RODMAN, J. We will consider the exceptions to the report of the referee *seriatim,* and first those of the plaintiffs:

1. That the sum allowed to the defendant as a fee to his attorney, Mr. Venable, is excessive.

The sum allowed is $200, and it appears that the attorney claimed, and the defendant paid, a much larger sum. Without going into any

discussion of the question, which would be an useless labor, we are of opinion that the allowance was not excessive. This exception is overruled.

2. That the allowance of commissions to defendant is illegal, and if any be allowed, 5 per cent is excessive. The legality of it depends on the construction of the agreement of defendant of 1 April, 1870. In that paper (A) he agrees that "if on a sale of said lands he (268) shall realize any profit after paying all the purchase money, costs and charges he may have been or hereafter may be at by reason of such purchase, he will hold the same for the use and benefit" of the plaintiffs.

We are of opinion that these words exclude the defendant from any claim to commissions or other compensation for his services. They cannot come under the head of *charges* that he had been or might thereafter be at. Such words clearly included only expenses paid out by him in attending to the business. This exception is sustained.

3. The referee credited defendant with $_____ paid to plaintiffs from about _____ to the beginning of this action. This exception is, that a large part of this credit is unsupported by the evidence. C. C. P., sec. 246, says: "When the reference is to report the facts, the report shall have the effect of a special verdict."

Of course, if there was no evidence of the payment which the referee allows as a credit, the exception would be sustained. And I think (although I do not know that my associates concur with me on this point) that if the evidence appeared clearly insufficient to support the findings of the referee on the matter of fact, we might disregard his findings, at least so far as to send it back for a new trial. But as was said in *Green v. Castleberry,* 77 N. C., 164, this Court reviews decisions of fact by a referee or by a judge below as a court of appeal, and not as a court of original jurisdiction.

This Court presumes the finding below to be right until it is shown to be wrong. Hilliard on New Trial, p. 484, ch. 14, sec. 68; *Smith v. McCluskey,* 45 Barb. (N. Y.), 610. In the present case, after having read such parts of the evidence bearing on this exception as we were referred to, we concur with the referee in his conclusion. It cannot be said that his conclusion is clearly against the weight (269) of the evidence. A discussion of such a point would be of no value, and we content ourselves with simply expressing our conclusion. One remark may be permitted on the evidence. Formerly a trustee disbursing money was not a competent witness as to any amount over some trifling sum, generally stated at $4; but now he is competent to prove disbursements by himself to any amount, his credibility being always open to be impeached.

The defendant, if he kept an account, as he swears he did, can scarcely be mistaken as to the sums paid out, except by an omission to charge a payment, which would be against himself. If he errs in excess, he must be deliberately and willfully false. Whereas I do not understand the plaintiffs to swear that they or either of them kept a complete account of the sums which they received. They may be honestly mistaken, and if mistaken at all, are no doubt honestly so.

We all know that nothing is more difficult than to keep accurately an account of trading at a store, or any other account, in the head for a great length of time. And the liability to error is increased if some only of the items are noted in a book, for we soon come to forget that all are not so noted, and to believe that there were no others.

We come now to the exceptions of the defendant:

1. The referee finds that the defendant is entitled to interest at 1½ per cent per month, on the $2,200 which he borrowed from the bank at that rate, for ninety days only, whereas defendant contends that he is entitled to retain for the interest which he actually paid at this rate, up to the date when he received money from the sale of the land to enable him to pay off his debt.

Our opinion on this point is with the defendant. The money was borrowed before the execution of the agreement of 1 April, 1870 (Exhibit A), and had been applied to obtain an assignment of the
(270) mortgage on the land, and it can scarcely be doubted that the whole transaction, including the rate of interest to be paid, was known to W. A. Green when the agreement was entered into. At all events, the agreement was to pay the plaintiffs any profit which the defendant might realize upon a sale of the lands after paying "all the purchase money, costs, and charges he may have been or hereafter may be at by reason of such purchase"; and until the defendant was indemnified from this interest, there could be no profit. There was no loan from the defendant to W. A. Green on which the defendant received usurious interest, or on which he made a profit of any sort. Substantially as the agent and for the benefit of Green, he borrowed money at usury on Green's agreement to indemnify him on the sale of the land. I know of no statute or principle of law making such an agreement illegal.

This exception is sustained, and as it does not clearly appear when the money was borrowed or when the defendant received money wherewith to pay the debt, the referee hereinafter appointed will ascertain those dates from the evidence before the former referee, or otherwise.

2. Relates to the sum paid to Mr. Venable, which has been already considered. Any sum paid to Mr. Venable for professional services beyond the $200 allowed to the defendant was unreasonable and excessive for any services which he is shown to have rendered. A trustee

cannot spend the money of his *cestui que trust* unnecessarily or extravagantly, and relying on a court for indemnity. This exception is overruled.

3. Referee does not allow defendant credit for $124 paid to W. A. Green while plaintiffs were living with him.

This payment does not come within the purposes as described in the agreement to which the profit on the sale was to be applied. The money and articles were supplied to W. A. Green, and upon (271) his credit, and not to the plaintiffs, upon their credit.

While they lived with their father, he was under a presumed obligation to support them, and it must be presumed that credit for family supplies was given to him, unless there is proof to the contrary. This exception is overruled.

4. This exception has been considered and disposed of with the first.

The judgment of the Superior Court is reversed, and it is referred to the clerk of this Court to modify the amount reported by Mr. Referee Strong, in accordance with this opinion, and report to this Court.

PER CURIAM. Reversed.

Cited: Overby v. B. and L. Association, 81 N. C., 60; *Cooper v. Middleton,* 94 N. C., 94; *Battle v. Mayo,* 102 N. C., 434.

---

(272)

EDMUND F. SUIT v. ROBERT S. SUIT.

Practice—Referee—Exceptions to Report—Homestead.

1. An exception to the report of a referee should discriminate and point out specifically the faults complained of. An exception "that the referee ought to have found as a conclusion of law that the plaintiff recover nothing" is not sufficient.
2. Where the defendant in his answer set up an itemized counterclaim, and the referee reported as to only *one* item, and defendant excepted because "the facts from which the conclusions of law are drawn are not found with sufficient distinctness and certainty to warrant them," and also because "there are certain material issues raised by the pleadings and sustained by the evidence which the referee has not set forth": *Held,* that the exceptions are not sufficiently distinct, and the court will *infer* that the referee passed upon all the items and rejected all except the one allowed.
3. Where the plaintiff having the equitable title to land sold his interest therein to the defendant and procured a conveyance to him from the person holding the legal title, it was *Held,* that the defendant was not entitled to a homestead against a judgment rendered on a note given by him to the plaintiff as part of the price of the land.

APPEAL from *McKoy, J.*, at Fall Term, 1877, of GRANVILLE.

This action was brought to recover the sum of $550 and interest alleged to be due by bond, and as the purchase money of a certain tract of land, of which it was alleged that the plaintiff was equitable owner in fee. The defendant denied that he bought the land of the plaintiff, but admitted that the legal title to the same as set forth in the complaint was vested in M. H. Suit, who conveyed it to the defendant, and alleged that the plaintiff was due him certain sums of money which were set up by items of a counterclaim. The plaintiff replied, and said that the land was bought at a sale for him, while he was a minor, by said M. H. Suit; and that it was agreed that said Suit and plaintiff should pay for the same in equal proportions, and that said Suit should have the deed executed to himself; and that the land sold was devised by the will of Robert Sweeney to the plaintiff and defendant and
(273) others, and was sold by an order of court upon their petition for partition.

The case was referred to a referee, who reported: (1) That defendant had made no payment on the bond; (2) that defendant loaned plaintiff $10, which has not been paid; (3) that said bond was given as part consideration for plaintiff's interest in the Sweeney land, and that the deed from said Suit to defendant for one-half of said land was executed at the request of plaintiff, and in fulfilment of his agreement with defendant in respect thereto; (4) that the clerk of the late county court sold the said land under said proceedings for partition, and executed a deed for the same to said Suit, the purchaser, and that it was agreed that plaintiff should have a deed for one-half of the same when he arrived at majority, upon payment of half of the purchase money, and that after the sale, the premises were occupied by said Suit and the plaintiff, as their joint property; (5) that the purchase money was paid by said Suit as follows: Said Suit and plaintiff paid in equal proportions all that was due, except the shares of the defendant and his two sisters, who were minors, but an arrangement was made for their benefit with J. R. Suit, their guardian, who accepted the joint bond of the plaintiff and M. H. Suit for $_____, being the amount due at that time, January, 1860, and upon which joint bond there is still an amount due, but how much, the referee cannot state with any certainty; (6) that there was a contract between plaintiff and defendant, in which it was expressly agreed that defendant should, and did, assume the payment of such sum as the plaintiff was or might be liable for on account of said bond; (7) that upon M. H. Suit's entering into the military service of the Confederate States in the year 1863, he drew up a paper-writing setting forth a contract between plaintiff and himself,
(274) assigning to plaintiff that part of said land which he afterwards,

at the request of plaintiff, conveyed to the defendant, and that this paper-writing or deed came into the plaintiff's hands, but has been lost or destroyed; and (8) that defendant does not own any other land than that conveyed to him by M. H. Suit.

The referee held that plaintiff was entitled to judgment for the amount of the bond, subject to the counterclaim of $10, and that defendant was not entitled to hold the land, conveyed at the instance of the plaintiff as aforesaid, as a homestead exempt from execution, but that plaintiff was entitled to an execution against the same to satisfy this judgment.

The defendant excepted to the report, for that:

1. The facts from which the conclusions of law are drawn are not found with sufficient distinctness and certainty to warrant them.

2. There are material issues raised by the pleadings and sustained by the evidence, which the referee has not set forth.

3. The referee ought to have held that defendant was entitled to hold the land as homestead exempt from execution, and specially that the value of his original interest in the Sweeney land, and that of his two sisters, were exempt from execution, as a homestead.

4. That the referee ought to have found as a conclusion of law that plaintiff recover nothing in this action.

His Honor overruled the exceptions, and confirmed the report of the referee. Judgment. Appeal by defendant.

No counsel for plaintiff.
Busbee & Busbee for defendant.

READE, J. 1. The defendant's first exception, that the referee has not found the facts with sufficient distinctness and certainty, is itself so much at fault in that very particular that for that rea- (275) son, as well as for the further reason that it is not true in fact, we cannot sanction it.

2. And the same is true of the second exception.

3. The third exception to the report, because it finds that the plaintiff's claim is for the purchase money of the land in controversy, and therefore that the defendant is not entitled to a homestead therein, as against the purchase money, is not sustained.

4. The fourth exception, that the referee ought to have found generally against the plaintiff's claim and in favor of the defendant's, is not sustained.

An exception ought to discriminate and point out specifically the faults complained of, else it has no force. For instance, how can it possibly aid the Court in finding out a fault, to say that the referee ought to have found for the defendant instead of the plaintiff? Or

that he has not been sufficiently clear in stating the facts, or in stating the law, without pointing out how, and in what the faults consist, or to say that there are matters in the pleadings which are not reported upon, without pointing out such matters.

The plaintiff's claim is a $550 bond, which the referee finds to be due and unpaid, in whole or in part. The defendant sets up a counterclaim of $90, and names the items, one of which is for $10. The referee allows the $10 only as the counterclaim, and deducts it from the plaintiff's claim, and finds the balance. And then the defendant says, in his argument, although it is not in any exception, that the referee did not pass upon *all* of his counterclaim. We infer that he passed upon all and rejected all except the item allowed, $10.

At any rate, that is not in the exceptions. Again, the defendant complains that the plaintiff had given to the guardian of the defendant a bond for the benefit of the defendant, and that that bond had not been paid. The referee finds that such bond was given, and that it
(276) was for $_____ (leaving the amount blank), and that there remained a balance due on it, leaving the amount due blank. And then the defendant says that those blanks ought to have been filled up. And that would seem to be so, but for the fact that the referee finds that it was a part of the land trade between the plaintiff and the defendant that the defendant was to pay off that bond and relieve the plaintiff from it. It was therefore wholly immaterial what the amount of the bond was, or how much was the balance unpaid.

So far as we can see, the rights of the parties were fairly ascertained and declared, and that the exceptions were properly overruled and the report confirmed.

There is no error. Judgment would be rendered here for the plaintiff, but as there has to be a sale of the land, and as that can be better done below than here, the cause will be remanded, that there may be judgment below for the plaintiff, and such further proceedings as the law allows.

PER CURIAM. Affirmed.

Cited: Currie v. McNeill, 83 N. C., 181; *Worthy v. Brower,* 93 N. C., 347; *Cooper v. Middleton,* 94 N. C., 94; *Battle v. Mayo,* 102 N. C., 437; *Manufacturing Co. v. Brooks,* 106 N. C., 113; *Tilley v. Bivens,* 110 N. C., 344.

(277)

WYATT EARP AND OTHERS v. W. H. RICHARDSON AND OTHERS.

Contract—Principal and Agent—Adverse Possession—Statute of Limitations—Demand.

1. Where E. delivered a note of H. to his son with instructions to go to H. and buy a mule and enter the price of the mule on the note as a credit, and the son entered into a bargain with R. to buy a horse for $125, with the understanding that if R. did not collect that amount out of the note by a certain time, he was to have his choice to take the horse back or take $125 for him: *Held*, that the legal effect of the transaction was to place the note with R. as a security for the price of the horse, and the property of the note remained in E.
2. A subsequent agreement between the son of E. and R. by which it was agreed that R. "might keep the note for the horse," does not alter the relations existing between the parties.
3. In such case the statute of limitations does not bar, because, (1) R. could not hold the note adversely to E. until after a demand; (2) the statute would not begin to run until after R. had collected the note.

SMITH, C. J., having been of counsel, did not sit on the hearing of this case.

APPEAL from *Eure, J.*, at Fall Term, 1877, of WILSON.

The plaintiffs brought this action to recover an amount alleged to be due on account of a certain note executed by Henderson Hocutt. The referee to whom the case was referred found the following facts:

1. Henderson Hocutt executed a deed of trust to the defendant J. M. Taylor on 9 January, 1867, conveying real and personal property to be sold to pay his debts.

2. The trustee sold the property and paid all the debts mentioned in the deed, except the note which is the subject of this controversy.

3. The plaintiff John Earp was a legatee of one William Earp, and received said note in payment of a legacy bequeathed to him (278) by the will of William Earp.

4. John Earp delivered the note to his son, Taylor Earp, to buy a mule of Henderson Hocutt, one of the makers of the note, and told his son to credit the note with the price of the mule. Taylor Earp then went to Hocutt to buy a mule, but Hocutt told him he had no mule to sell. Taylor then offered the note to sundry persons at $125 to $150, and tried to buy a horse of other persons with the note; and after keeping the note about three weeks, he did get a horse of defendant Richardson, valued at $125, in March, 1870, when the following paper was executed: "This is to certify that I, Taylor Earp, have given to W. H. Richardson one note against Henderson Hocutt and D. W. Bunn, payable to William Earp, for $500, given 13 March, 1858, for one bay horse,

5 years old, which I, Taylor Earp, do promise, if said Richardson fails to collect $125 out of said note by 25 December next, that I will give the said Richardson his choice to take $125 or take back the horse. 30 March, 1870." Signed by Taylor Earp, and witnessed by J. R. Nowell.

5. Richardson did not know that John Earp laid any claim to the note, but traded with Taylor Earp as the one in possession and the owner of the note.

6. In the fall of 1870, Taylor Earp agreed with Richardson that he might keep the note for the horse, and Taylor Earp afterward sold the horse to one W. W. Richardson.

7. Subsequently John Earp sold his claim to the note to his coplaintiff, Wyatt Earp, for $200 (and other articles contained in a transfer to said Wyatt), knowing that it was in the possession of defendant Richardson.

8. John Earp never demanded the note of Richardson, but knew that in the fall of 1870 his son had bought a horse of defendant with the note, and that defendant claimed the note adversely. He did not
(279) disavow the action of his son, nor did he know the nature of the agreement between his son and Richardson.

9. The summons in this action was issued on 29 March, 1875.

The plaintiffs filed exceptions to the report of the referee, which were overruled by his Honor, and the ruling of the referee, that the right of action of the plaintiffs was barred by the statute of limitations, and if the statute did not apply, that the plaintiffs were bound by the acts of Taylor Earp, their agent, was sustained, and judgment rendered in favor of defendant Richardson, against his codefendant, J. M. Taylor, trustee, for the amount of the note. From which judgment the plaintiffs appealed.

Gilliam & Gatling and George M. Smedes for plaintiffs.
Busbee & Busbee for defendants.

READE, J. The claim of the defendant Richardson, to realize nearly $1,000 for a $125 horse, provokes scrutiny, to say the least. One William Earp held a note on one Hocutt for $500. William Earp died, and said note came into the hands of his son John, plaintiff, as a legacy. The plaintiff John delivered the note to his son, Taylor Earp, with instructions to go to Hocutt, the maker of the note, and buy a mule, and enter the price of the mule upon the note as a credit. The principal and interest of the note were then about $860.

The legal effect of that transaction between the plaintiff John and his son was to leave the *property* in the note in the said plaintiff, with a power in the son to appropriate enough of it to his own use to pay the

maker, Hocutt, for a mule, and enter the amount as a credit on the note, and then to return the note to the plaintiff John.

Failing, however, to get a mule from Hocutt, the son, Taylor (280) Earp, "took the liberty" of entering into a bargain with defendant Richardson for a horse at $125, and gave him the note, with the understanding that if Richardson did not collect $125 out of said note by the 25th of the next December, he was to have his choice to take the horse back or to take $125 for him.

The legal effect of this contract (supposing the son, Taylor Earp, to have had the power to make it at all) was to place the note with Richardson as a security for the $125, and the property in the note remained in the plaintiff, John Earp. In opposition to this, it is insisted that the note itself was given to Richardson as the payment of the price of the horse, if he thought proper so to regard it. But this is not true. There was no agreement that he was to collect the whole of the note and have it all, but if he did not collect $125 by a given time "out of the note," then he was to have, not the note, but $125 or the horse back again. This is not only the proper construction of the words used, but a subsequent transaction shows that the parties understood that the note itself was not given for the horse; for subsequently, and before December, it was agreed between the son and Richardson that Richardson "might keep the note for the horse," which agreement would have been unnecessary if it had been so agreed in the first instance.

What was the effect of this last contract—that Richardson was to have the note for the horse? We have already seen that when the plaintiff John parted with the note to his son, it was upon the express understanding that his son was to have enough of it to buy a mule of the maker of the note, and to enter the amount as a credit on the note. This was a limited power by the very terms of it, and the son could not exceed it, and any one dealing with him was obliged to look out for his power, as the note was neither payable to him nor indorsed to him; for although the note was negotiable, yet it was past due and dishonored, and put the purchaser upon inquiry. The son had no power to use the note to buy a horse of any one else except Hocutt. But suppose (281) we allow a liberal construction, and say that as it was the plaintiff's intention to give the son so much of the note as would buy him a horse, it is not a matter of substance whether he bought the horse of one man or another; still we could not give the son any larger power over the note in trading with Richardson than if he had traded with Hocutt; and that was, not to pay for the horse *with* the note, but *out of* the note.

Our opinion therefore is, that when Richardson took the note, whether under the first contract or under the second, he took it as a security for the price of the horse, $125. This view settles the other question as to

the statute of limitations; for if Richardson held the note as a security only, then he was bailee, or trustee, for the plaintiff John, and the statute did not begin to run until after a demand. It is true that the referee finds that he held adversely; but he also finds that the plaintiff made no demand, and as a question of law the defendant could not hold adversely until after a demand. He could not change his character, of his own will. Indeed, the statute would not bar anyway, because Richardson has not yet collected the note, but the same is due and unpaid. There is error. The judgment below is reversed.

There will be judgment in this Court in favor of Richardson against the defendant trustee, Taylor, for the price of the horse, $125 and interest from the date of the sale. And there will be judgment in favor of the plaintiff Wyatt Earp against the defendant trustee for the remainder due on said note. The clerk of this Court will make
(282) the calculation and report, for which he will be allowed $5. The costs will be paid by the plaintiff Wyatt Earp.

PER CURIAM. Reversed.

Cited and affirmed on rehearing, 81 N. C., 5.

L. D. GULLEY v. BARDEN & BRO.

Principal and Agent—Construction of Bond—Measure of Damages—Bailment.

1. Where the plaintiff constituted the defendants his agents for the sale of sewing machines, and took from them a bond conditioned, among other things, that they should return to the plaintiff "all machines that are not sold, in as good order as received": it was *Held*, in an action by the plaintiff upon the bond to recover the contract price of certain machines delivered to defendants which they had offered to return in a damaged condition, but which plaintiff had declined to receive, that the measure of damages was the difference in value estimated upon the basis of the contract price in the condition in which they were received by defendants and their condition when defendants offered to return them.
2. In such case the defendants were but bailees, and until sold the property in the machines remained in the plaintiff.

ACTION upon a bond to recover money alleged to be due, and for damages, tried at Spring Term, 1877, of SAMPSON, before *Seymour, J.*

The facts necessary to an understanding of the opinion are set out by the *Chief Justice*. Verdict and judgment for plaintiff. Appeal by defendants.

Kerr & Kerr for plaintiff.
Battle & Mordecai for defendants.

SMITH, C. J. On 26 July, 1873, the defendants, Barden & Brother, principals, and the others, sureties, executed a bond to (283) the plaintiff in the penal sum of $500, with the following condition:

"The condition of the above obligation is such that whereas the above bounden Barden & Brother, as aforesaid, have been appointed agents by the said L. D. Gulley, to sell the Home Shuttle Sewing Machines: Now, therefore, if the said Barden & Brother shall well and truly pay to the said L. D. Gulley the wholesale price, or price to agents, for machines and all attachments sold by them as his agent, and shall return all machines and attachments that are not sold, in as good order as received, then this obligation is void and of no effect; otherwise, to stand in force."

Under the arrangement specified in the bond, the plaintiff delivered many machines to their agents, some of which were sold and all the proceeds accounted for, except the sum of $52, which is still due. Others have been returned, and three were tendered to the plaintiff's attorney and refused, on the ground that they were damaged and not in the plight in which they were delivered to the agents.

In this action brought upon the bond, the plaintiff seeks to recover the money balance due for the machines sold, and the contract price for those which he had refused to take back.

On the trial the defendants contended there was a variance between the bond produced in evidence and that described in the complaint, and also that without a previous demand the action could not be maintained.

The court expressed the opinion that the plaintiff must show a demand for the machines, or that they had been tendered and refused, or were in such damaged condition that the plaintiff could not receive them, and that in the two last cases a demand was unnecessary, because useless.

Evidence was then introduced by both parties on the question (284) whether there had been an offer to return, and refusal to receive the machines, and as to their damaged condition just before the action was brought.

Among other things not necessary to be repeated for the purposes of this case, the court instructed the jury as follows: "That the defendants had undertaken to deliver the machines in as good condition as when received by them, and that it was a question for the jury to pass upon, whether the machines were in such bad condition at and before the commencement of the suit that they could not be delivered to the

plaintiff by the defendants in the same condition as when received. And if the jury should find that they were in such bad condition that they could not be delivered, in the language of the bond, *'in as good order as received,'* then the plaintiff would be entitled to recover the value of the machines and fixtures."

The court then proceeded to explain the meaning and force of the words, "in as good order as received," and the obligation imposed upon the defendants by their undertaking, and repeated the instruction, that if the defendants were unable to redeliver the machines, because of the great damage they had sustained, in as good condition as when they were received, the verdict should be rendered for the plaintiff.

The jury rendered a verdict for the plaintiff and assessed his damages at $170.

We think the instruction erroneous, and based upon a misconception of the obligations assumed by the defendants. The plaintiff constitutes the defendants Barden & Brother, his agents, for the sale of the sewing machines on the terms set out in the condition of the bond, and the bond is executed to secure the performance of the duties growing out of that relation. The machines are deposited with the agents for sale,
(285) and they covenant to pay the moneys due the plaintiff on such as are sold, and to return such as are not sold in as good order as when they were received. They are but bailees, and until a sale the property in the goods remains in the plaintiff.

The ordinary duty of a bailee is to take proper care of the goods committed to his custody, and here the defendants superadd to this legal obligation and contract, unconditionally to restore the unsold machines uninjured, and make themselves absolutely responsible for any damage which may come to them while in their possession. This is the full extent of the covenant, to return such of the machines as they have not been able to dispose of "in as good order as received."

The correlative right and duty of the plaintiff was to take back all such as are uninjured, and to have compensation for such damages as the others have sustained. This is the full measure of the plaintiff's rights and of the defendants' responsibilities under the promises and stipulations of their contract.

The measure of the plaintiff's damages in regard to the undelivered machines is the difference in their value, estimated upon the basis of the contract price, in the condition in which they were received by defendants and their condition when defendants offered to return them.

There is error, and we award a

PER CURIAM. *Venire de novo.*

(286)

EMIL KATZENSTEIN v. THE RALEIGH AND GASTON RAILROAD COMPANY.

Action Against Railroad Company—Service of Process—Local Agent—Deposition.

1. In an action against a railroad company, service of the summons upon a local agent of the company is sufficient to bring the defendant into court.
2. Where, in such case, notice of another proceeding in the action was served upon such local agent: it was *Held*, to be sufficient, in the absence of any allegation that thereby any injustice had befallen the defendant.
3. No objection can be made to a deposition taken in an action, for any irregularity in taking the same, after the trial has begun; such objection should be taken by motion to quash the deposition before the commencement of the trial.

APPEAL from a justice's court, tried at Spring Term, 1877, of WARREN, before *Buxton, J.*

This action was brought to recover the value of certain goods delivered by the plaintiff to the defendant company, and consigned to Belcher, Parks & Co., of New York, in which it was alleged that defendant failed to safely deliver the same as agreed upon. To prove the allegations in the complaint, the plaintiff offered, in addition to other evidence, certain depositions taken in New York, and the defendant objected to the evidence upon the ground that the notice of taking the depositions was insufficient, in that it was served on O. P. Shell, the local agent of the defendant at Warrenton depot, upon whom the original summons in the action had been served, and insisted that the same should have been served on the president, or superintendent, or a director of the company. Objection overruled. Verdict and judgment for plaintiff. Appeal by defendant.

(287)

C. A. Cook and Moore & Gatling for plaintiff.
J. B. Batchelor and L. C. Edwards for defendant.

FAIRCLOTH, J. On the trial of this action the defendant objected to the admission of certain depositions as evidence for the plaintiff, on the ground that notice of taking such depositions was served upon the local agent of defendant, at Warrenton depot, upon whom the original summons in the action had been served, and insisted that the notice should have been served on the president or superintendent of the company, or one of its directors, and this is the only exception.

The service of the summons on the local agent was sufficient for an action in the Superior Court (C. C. P., sec. 82 (1); Laws 1874-75,

ch. 168) and these provisions, in regard to the service of process upon corporations, apply to justices' courts. Bat. Rev., ch. 63; Rule XV.

If service on such agent was sufficient to bring the defendant into court, it would seem clear that notice of any proceeding *in* the action on the same agent would suffice, in the absence of any allegation that thereby any injustice has befallen the defendant. We assume that the deposition was taken after the justice's trial, and before the trial term of the Superior Court, and that the objection was first raised to the deposition during the trial, and not by a motion to quash the deposition before the trial began. If we are wrong in these respects, it is because we are not better informed by the record, nor by counsel in their argument.

In this view of the fact, the objection comes too late. "No deposition shall be quashed or rejected on objection first made after a trial has begun, merely because of an irregularity in taking the same, provided it shall appear that the party objecting either had the notice of its being taken as herein prescribed, or had notice that it had been taken, and was on file long enough before the trial to enable him to
(288) present the objection as prescribed in the next section. At any time before any action or proceeding has begun, any party may move the judge to reject a deposition for irregularity in the taking of it, of the whole or any part of it, for . . . or for any other sufficient cause." Laws 1869-70, ch. 227, secs. 12, 13. The same point was decided in *Carson v. Mills,* 69 N. C., 32.

PER CURIAM. No error.

Cited: Wasson v. Linster, 83 N. C., 580; *Barnhardt v. Smith,* 86 N. C., 480; *Sparrow v. Blount,* 90 N. C., 518; *Woodley v. Hassell,* 94 N. C., 160; *Carroll v. Hodges,* 98 N. C., 419; *Davenport v. McKee, id.,* 507; *Hopkins v. Bowers,* 111 N. C., 179; *Grady v. R. R.,* 116 N. C., 953.

---

(289)

P. H. SUMNER v. THE CHARLOTTE, COLUMBIA AND AUGUSTA RAILROAD COMPANY.

Agent and Principal—Depot Agent—Railroad—Seizure by Confederate Government—Common Carrier—Bailee.

1. In an action for damages against a railroad company, where it appeared that the plaintiff had employed one C., who was a depot agent of the defendant, to purchase cotton for him and to hold and ship it under his directions: it was *Held,* that C., in so dealing in cotton for the plaintiff,

acted solely as the *plaintiff's* agent, and there was no liability on the defendant for any loss resulting from the failure of C. to perform his duty as such agent. The law does not favor double agencies.

2. In such case, where it appeared that the plaintiff instructed C. not to ship until he had purchased a certain number of bales, and before C. had acquired the requisite number the railroad was taken by irresistible force into the complete control of the Confederate Government, C. thereafter acquiring the requisite number: it was *Held*, that the court below erred in submitting to the jury an issue as to whether or not it was impossible for the defendant company to ship the cotton.

3. In such case the defendant was not liable as common carrier, but as bailee, if at all. And the fact that before the requisite number of bales was obtained by C., the railroad was seized by the Confederate Government, is at least evidence to be considered that the defendant never received the cotton at all, either as bailee or common carrier.

BYNUM, J., having been of counsel in the court below, did not sit on the hearing of this case.

ACTION for damages, removed from MECKLENBURG and tried at Fall Term, 1877, of CABARRUS, before *Kerr, J.*

This action was brought to recover damages for the loss of 85 bales of cotton which the plaintiff alleged he had delivered to the defendant company at Ridgeway, South Carolina, to be transported to Charlotte, North Carolina, and that the defendant negligently failed (290) to notify the consignee of its arrival in Charlotte, and negligently lost the same or converted it to defendant's own use. It appeared that said cotton was bought for plaintiff by A. K. Craige, the depot agent of the defendant at Ridgeway; the plaintiff having placed in Craige's hands, in 1863, a considerable sum of money, with instructions to buy the cotton, also directing him when, and to whom, to ship it. It further appeared that the defendant's road, at the time of the alleged delivery of said cotton to the agent at Ridgeway, was in the possession of the authorities of the Confederate Government, and used for the transportation of munitions of war and supplies for the Confederate Army, and that by the irresistible force of said Government in the management and control of the same, it was impossible for the officers of the road to transport the property of individual citizens. There was much evidence adduced upon the trial in the court below, but that portion which is necessary to an understanding of the case is set out by *Mr. Justice Reade* in delivering the opinion of this Court. Under the instructions of his Honor, the jury rendered a verdict for the plaintiff. Judgment. Appeal by defendant.

W. J. Montgomery and W. H. Bailey for plaintiff.
Wilson & Son and R. Barringer for defendant.

READE, J. The theory of the plaintiff is that in November, 1864, he delivered to the defendant at its depot, Ridgeway, in South Carolina, 85 bales of cotton to be delivered to him in Charlotte, North Carolina, and that the same was never delivered, and that it is a total loss. In order to support that theory, the plaintiff himself testified that one Craige was the defendant's depot agent at Ridgeway; that the plaintiff in October, 1863, employed Craige as his agent and furnished him with money to buy cotton for him, and that Craige agreed "to ship (291) any cotton so purchased, whenever directed"; that in March, 1864, he was at Ridgeway, and saw 10 bales on the platform, marked to him, and again in June, 1864, he saw 48 bales marked to him, and that he then instructed Craige that as soon as 85 bales should be secured, he should ship. He proves by another witness that in July, or August, there were 48 bales; and, by the same witness, that in December, 1864, Craige told him that he had 85 bales, and had not shipped for want of cars. And another witness testifies that he saw the cotton still at Ridgeway on 10 February, 1865.

Now, taking this testimony to be true, does it support the plaintiff's theory? Upon the supposition that Craige was the defendant's depot agent, what was his business? Manifestly to do what the defendant was bound to do. What, then, was the defendant bound to do? Its ordinary duty was to receive freight and transport it within a reasonable time, as a common carrier; and as incident to this, it had the duty of bailee or warehouseman when it was necessary to store goods. This duty the defendant had to perform through agents—in this instance, through Craige. It is to be assumed, from the mere fact that Craige was the depot agent, that he had the power to perform this duty, and to make contracts in regard thereto, and to bind the defendant in regard to all matters germane to its business. Beyond that, it is not to be assumed that he had any power, and the burden of proving that he had is upon him who alleges it. In this case there is no evidence that he had any other power than what was incidental to his employment as depot agent; and without pretending to define with any nicety the limits of his power, we may surely say that it did not extend to the buying of cotton for the plaintiff for the space of twelve months, and holding it for that time. All that Craige did, therefore, in buying the cotton and holding the same under the employment and directions of the plaintiff from Octo- (292) ber, 1863, up to the time when he was directed to ship it in the fall of 1864, he did as the agent of the plaintiff; and the defendant is not liable for any loss that resulted from Craige's failure to perform his duty as the agent of the plaintiff.

Although we do not make this case turn upon it, yet it is in it, and therefore may be remarked upon, that the law does not favor double

agencies. It is almost impossible to prevent a conflict of duties and of interests. If I make one my agent, and he take an interest in the subject-matter and act upon it, he cannot bind me, although he act perfectly fair. It is scarcely less objectionable if he take an agency for another who has an interest adverse to mine. Both the Bible and Justice Story say that one cannot serve two masters. Especially is this reprehensible in such matters as are now under consideration. It is the duty of a railroad, which has a franchise from the public, to accommodate and serve the public fairly and impartially; and such is the duty of its agents, with the additional duty to serve the road faithfully. But here the plaintiff employs the defendant's agent to be *his* agent and to do *his* bidding; and although it may not be that any harm did result to the public in this case, yet the temptation to do it, and the ease with which it may be done, make it impolitic to encourage it, to say the least.

But however that may be, the plaintiff himself proved that he instructed Craige not to ship the cotton until he had bought 85 bales, and there is no evidence that he had bought 85 bales until December, 1864, so that defendant could not have shipped the cotton until December, 1864. And then the defendant alleges in his answer, and the president of the road testifies, that in September, 1864, the irresistible military forces of the Confederate Government took the possession and the complete control and occupation of the road, and that it was impossible for the defendant to ship the cotton; and the defendant asked his Honor to charge the jury that this was a good defense. His (293) Honor refused so to charge, or to submit the question to the jury, declaring that there was "no evidence that the cotton was destroyed by a public enemy, and that no irresistible force would excuse the defendant unless it proceeded from the act of God or the public enemy; and that any destruction by the Confederate Government or its officers, its army or agents, would not relieve the defendant from responsibility."

This doctrine may be true enough as applied to common carriers who are insurers, and are forbidden by public policy to have any other excuse, but it is untrue as applied to bailees or warehousemen. They are not insurers, and are bound only for due care. Craige had been expressly instructed by the plaintiff not to ship the cotton until he bought 85 bales. He had not bought 85 bales up to September, when the road was taken out of defendant's control. So that the most that can be said against the defendant is that at the time the road was taken from it, it was a bailee and not a common carrier. In failing to make this discrimination, his Honor erred.

The defendant is entitled to have the military occupation of the road considered in another aspect: If Craige held and controlled the cotton as the plaintiff's agent up to September, 1864, and the defendant lost its

road at that time, it is at least evidence to be considered, that it never received the cotton at all, either as bailee or common carrier. There are other exceptionable matters which may not occur on another trial.

It is clear that the rights and liabilities of the parties were not understood on the trial, and therefore, and for the errors specified, there must be a

PER CURIAM. *Venire de novo.*

Cited: Lamb v. Baxter, 130 N. C., 68; *Swindell v. Latham,* 145 N. C., 151.

---

(294)

JOSEPH T. PHILLIPS v. THE NORTH CAROLINA RAILROAD COMPANY.

Common Carriers—Powers and Liabilities—Transportation of Freight —Evidence—Special Contract.

1. A common carrier (except in the case of an incorporated company disabled by the provisions of its charter) may by special contract bind itself to convey and deliver goods to points beyond its own lines and outside of the limits of the State wherein its road lies.

2. Where various companies form an association and unite in making a continuous line of their respective roads, and collect either in advance at the place of receiving or at the place of delivery the freight due for the entire route, subdividing among themselves, the receiving road becomes responsible for the default of any of the associated companies, and no special contract need be shown.

3. Where no such association exists and no special contract is made, and goods are delivered to a road for transportation over it, though marked to a place beyond its terminus, the carrier discharges its duty by safely conveying over its own road and then delivering to the next connecting road in the direct and usual line of common carriers towards the point of ultimate destination.

4. Where on the trial below it appeared that the defendant company received certain freight for transportation to a point beyond its terminus, and gave therefor a bill of lading, "Received from L., to be laden on the freight cars, 1 bale bedding, etc., J. F. Phillips, Monroe, La.; marks, etc., as per margin, which are to be delivered (condition of contents unknown) to _____ or assigns at _____ Station," signed by the agent of the defendant, and at the time of receiving such freight the agent said to the shipper that the goods would reach Monroe in good condition and in a few days, etc.: *Held,* that there was no evidence to go to the jury of a special contract on the part of defendant to convey the goods to the point of destination and deliver them to plaintiff there.

PHILLIPS *v.* R. R.

ACTION for damages, tried at Spring Term, 1877, of WAKE, before *Buxton, J.*

On 31 January, 1872, the plaintiff being about to remove to the State of Louisiana, delivered to the defendant's agent at Raleigh, a bale of goods, and took from the agent a receipt in these words: (295)

Receipt for goods.

Marks, etc.	NORTH CAROLINA R. R. RALEIGH STATION, 31 Jan., 1872.

Received from A. O. Lee & Co., to be laden on the freight cars,

1 Bale Bedding, etc.,
J. F. PHILLIPS,
Monroe, La.

marks, etc., as per margin, which are to be delivered (condition of contents unknown) to_____or assigns at _____Station.

D. R. NEWSOM,
Agt. N. C. R. R. Co.

The plaintiff testified that he delivered the bale at the station to the agent, D. R. Newsom, who made examination and declared the article to be in good condition, and said it would reach Monroe in like good order; that he informed the agent that the bale must go to Monroe, and he wanted it put through as soon as possible, as the witness himself desired to start at once, and would need the goods as soon as he arrived at Monroe. The plaintiff offered to pay the freight in advance, and the agent declined to take it, and told the plaintiff to pay at Monroe when the bale reached that place, which would be in a few days; and the agent made some other remark, which plaintiff did not distinctly remember, about the pay of the road being remitted from Monroe. The agent of the defendant who gave the receipt has since died.

It was shown by the defendant that the bale was at once put on one of its freight cars and transported safely to Charlotte, the terminus of its line of road, and about the 3d of February delivered in good order to the Charlotte and Columbia Railroad, it being next on the most direct line of common carriers for transportation of goods (296) from Raleigh to Monroe. The bale never reached its destination, but was lost somewhere on the route between Charlotte and Monroe. Upon this evidence issues were submitted to the jury: (1) Did the defendant make a special contract with the plaintiff to transport the bale from Raleigh to Monroe? (2) Was the bale lost on the route? (3) What was its value? The answer to the two first issues was in the affirmative, and damages were assessed under the last issue.

The defendant, however, contended that there was no evidence to go to the jury that the defendant's agent made any special contract to transport beyond the terminus of its own road, and if any such was made, it was *ultra vires,* unauthorized, and void; and that, having safely carried the goods to Charlotte, and then, as forwarding agent, placed them in possession of the Charlotte and Columbia Railroad, the defendant had fully discharged its obligations to the plaintiff.

The court instructed the jury that the defendant had power under its charter to make a special contract to convey to Monroe, and there was evidence to be considered by the jury that the defendant had entered into such special contract. The jury under these instructions found for the plaintiff (as above). Judgment. Appeal by defendant.

Merrimon, Fuller & Ashe for plaintiff.
D. G. Fowle and J. B. Batchelor for defendant.

SMITH, C. J., after stating the case as above: Two questions are presented upon this statement of facts for our determination:

1. Has the defendant legal capacity to enter into a contract for the transportation of goods over its road and to *places beyond,* and *outside the limits of the State?*

(297) We hold that a railroad, not disabled by the provisions of the act of incorporation, is competent to make such contract and assume the responsibility of a common carrier over the entire route from the place of receiving to that of delivery of freight. This power is necessary to the usefulness of roads and the convenience and security of the public. In such case the owner can recover upon the contract for the loss or injury of his goods, and the contracting incorporation incurring loss from the misconduct or negligence of the carrier into whose custody on the route they have passed, may provide by proper arrangements with the connecting lines for its own indemnity and reimbursement. This rule is eminently just and proper and calculated to facilitate and encourage arrangements among the roads by which the shipper is relieved from the necessity of ascertaining by whose default the damage is incurred. But in the absence of a special contract the liability does not extend beyond the terminus of the receiving road and the safe delivery to the other road. This doctrine is settled by numerous cases in this country which are collected and discussed by Judge Redfield in his valuable work on Railways. 2 Red. Railways, secs. 162, 163, and notes.

2. The second question we are called on to consider is, Was there any evidence of such special contract to go to the jury?

The contract of the defendant is contained in the bill of lading or

receipt which the defendant's agent gave to the plaintiff when the bale was delivered. The undertaking of the defendant, as therein expressed in what appears to be a form used by the company, is to convey and deliver to a station, the blank left for designating, which has not been filled. The conversation deposed to by the plaintiff as having taken place between the agent and himself is entirely consistent with a contract to convey over his own road only, and but expresses the agent's confidence that the goods would pass safely over the entire route and meet the plaintiff at Monroe. If admissible at all to affect a (298) written contract contained in the receipt, it furnishes no ground upon which a jury was authorized to infer a special contract, fraught with such consequences to the company, and when it does not appear that any arrangements for continuous transportation over the route had been made by the defendant with the other lines, whose coöperation was necessary for the safe transmission of goods to a place so remote. And it will be noticed that the bale would have to pass through four States, besides those in which are the termini of the route of transportation.

As the subject is of great public importance, and the obligations imposed upon common carriers, when freight is to pass over connecting lines, should be understood by them, as well as by those who may require their services, and as the result of our examination of numerous cases decided in this country, we think the following propositions may be regarded as established:

1. Common carriers may by special contract bind themselves to convey and deliver goods to points beyond their own lines and outside the limits of the State where their roads lie.

2. Where various companies form an association and unite in making a continuous line of their respective roads, and collect, either in advance at the place of receiving or at the place of delivery, the freight due for the entire route, subdividing among themselves, the receiving road becomes responsible for the default of any of the associated companies, and no special contract need be shown.

3. Where no such association exists and no special contract is made, and goods are delivered to a road for transportation over it, though marked to a place beyond its terminus, the carrier discharges its duty by safely conveying over its own road, and then delivering to the next connecting road in the direct and usual line of common carriers (299) towards the point of ultimate destination. 2 Redfield, *supra; Stock Co. v. R. R.*, 48 N. H., 339; 2 Redfield Am. Railway Cases, 316; *Dixon v. R. R.*, 74 N. C., 538; *Laughlin v. R. R.*, 28 Wis., 204.

PER CURIAM. *Venire de novo.*

Approved: *Lindley v. R. R.*, 88 N. C., 551; *Phifer v. R. R.*, 89 N. C., 320; *Weinberg v. R. R.*, 91 N. C., 33; *Ramsay v. R. R., ib.*, 420; *Mills v. R. R.*, 119 N. C., 709; *Furniture Co. v. Express Co.*, 144 N. C., 645; *Reid v. R. R.*, 153 N. C., 496.

Distinguished: *Knott v. R. R.*, 98 N. C., 77; *Meredith v. R. R.*, 137 N. C., 483.

(300)

PAUL W. CRUTCHFIELD v. THE RICHMOND AND DANVILLE RAILROAD COMPANY.

Master and Servant—Negligence—Liability of Master—Contributory Negligence.

1. If a servant remains in his master's employment with knowledge of defects in machinery which he is obliged to deal with in the course of his regular employment, he assumes the risks attendant upon the use of the machinery unless he has notified the master of the defects, so that they may be remedied within a reasonable time. If he sees that the defects have not been remedied, yet continues to expose himself to the danger, the master's liability ceases.
2. Where both master and servant have equal knowledge of such defects, and the servant continues in the service and in the discharge of his regular duties, each party takes the risk.
3. If the servants have no knowledge of such defects, he is not thereby exempted from ordinary care and caution, and if he so far contributes to his injury by his own negligence or want of care and caution as but for such negligence the injury would not have happened, he cannot recover.
4. Where on the trial of an action for damages against a railroad company for an injury received by the plaintiff while coupling cars, the court declined to charge the jury that "if they believed that the plaintiff knew or had reasonable grounds for believing that the engine used by defendant prior to the time of the injury complained of was not controllable by the engineer, and that the roadbed was in a dangerous condition, and the plaintiff was injured thereby, then the plaintiff was guilty of contributory negligence, and the defendant was not liable; and that this was so whether the defendant knew or was ignorant of the condition of the engine or roadbed": it was *Held*, to be error.

ACTION for damages, removed from Forsyth and tried at Fall Term, 1877, of DAVIE, before *Cox, J.*

The plaintiff was in the employ of defendant company and brought this action to recover damages for injuries received in coupling its cars.

See same case, 76 N. C., 320.

(301) The defendant's counsel asked the court to instruct the jury:

1. That if they believed that defendant knew or had reasonable grounds for believing that the engine used by defendant prior to the time of the injury complained of was not controllable by the engineer, and that the roadbed was in a dangerous condition, and the plaintiff was injured thereby, then the plaintiff was guilty of contributory negligence and the defendant was not liable; and that this was so whether the defendant knew or was ignorant of the condition of the engine or roadbed.

2. If they believed that the engine was unsafe and the roadbed dangerous, and the engineer and section master failed to notify defendant of the condition of the same, and the plaintiff was injured in consequence thereof, then the defendant was not liable, because the injury resulted from the negligence of the coemployees of plaintiff.

The defendant excepted to his Honor's charge, in that it was not responsive to the instructions asked. The issues submitted and the findings thereon were the same as reported in 76 N. C., 320, except that the amount of damages assessed was $6,000. Judgment for plaintiff. Appeal by defendant.

Watson & Glenn for plaintiff.
J. M. Clement and J. M. McCorkle for defendant.

BYNUM, J. The first instruction asked for by the defendant should have been given. It presupposes the negligence of the company and puts the case upon the true subject of inquiry, that is, Was the injury complained of caused by this negligence or was it incurred in consequence of the negligence of the plaintiff? There was evidence tending to show that the plaintiff had a knowledge or reasonable ground of knowledge of the defective engine and roadbed. The farthest the courts have ever gone in such cases is this: If the servant re- (302) mains in the master's employ, with knowledge of defects in machinery he is obliged to deal with in the course of his regular employment, he assumes the risks attendant upon the use of the machinery, unless he has notified the employer of the defects, so that they may be remedied in a reasonable time. But if he sees that the defects have not been remedied, yet continues to expose himself to the danger, the employer's liability ceases. And so where both parties, the employer and employee, have equal knowledge, and the servant continues in the service and in the discharge of his regular duties, each party takes the risk.

But suppose the plaintiff had no knowledge of the defects in the engine and road, he is not thereby exempt from ordinary care and caution; and if he so far contributes to his injury by his own negligence or want of care and caution as but for such negligence the injury would not have happened, he cannot recover. The plaintiff was a brakeman, and one of

his regular duties was to couple and to uncouple the cars. Whether in the discharge of this duty at the time of the injury he acted with ordinary care and caution, was a material inquiry upon the issue as to contributory negligence. The duty of coupling cars is a dangerous duty, and those who make it their employment must have the firmness and presence of mind corresponding to the risk. The plaintiff knew that the engine was not a good one, and he admits that by standing sideways he would have been protected by the bumpers, and he further admits that he lost his presence of mind, and was injured in attempting to escape.

How his arm was crushed is not explained. If it was by the bumpers, how did it get between them? Is the arm inserted between or extended over the bumpers in order to couple the cars? These were questions to be decided by the jury upon the evidence of experts, or those (303) familiar with the regulations and usages of railroad companies, upon proper instructions from the court.

If the plaintiff knew that the engine was defective, a greater degree of caution was imposed on him not to deviate from any of the rules and regulations prescribing the manner of coupling the cars. If the plaintiff did not know or have sufficient reason to know that the engine was defective, he is not held to the same high degree of care and caution; yet under any circumstances he must use the care and caution required by an employment not without danger at all times.

The instruction asked was, that if the plaintiff knew or had reasonable grounds to know that the engine used by the defendant was not controllable by the engineer, and that the roadbed was in a dangerous condition, and the plaintiff was injured in attempting to couple the cars, he was guilty of contributory negligence and could not recover. We think the defendant was entitled to a distinct and affirmative response to the instructions asked for. While the charge of the court was correct in the main, it can by no plain intendment be made to embrace and give the specific instructions requested by the defendant, or the substance of them.

When this case was before us at a former term of the Court (76 N. C., 320) the principal question in dispute was whether the engine was a good or bad one, and whether the defendant was responsible for an injury of one coservant by the negligence of another, and if it is supposed that the point now insisted on was decided in that case, a careful reading of the case and opinion will show otherwise.

Assuming that the plaintiff had no knowledge of the defectiveness of the engine, and also assuming that the defendant was guilty of negligence, the question in the case would be reduced to this Did the plaintiff so far contribute to his injuries by his own negligence (304) or want of proper care and caution as but for such negligence or

want of proper care and caution on his part the accident would not have happened?

Jones v. R. R., Central Law Journal, 18 January, 1878; Whart. on Neg., secs. 229 to 243; *Butterfield v. Forrester*, 11 East, 60; *Bridge v. R. R.*, 10 M. & W., 546; *Ince v. Boston Co.*, 106 Mass., 149; 12 Q. B., 439; *Tuff v. Watman*, 5 Scott C. B., (N. S.) 572.

PER CURIAM. *Venire de novo.*

Cited: *Johnson v. R. R.*, 81 N. C., 458; *Cowles v. R. R.*, 84 N. C., 313; *Porter v. R. R.*, 97 N. C., 73, 79; *Coley v. R. R.*, 128 N. C., 537; *Ausley v. Tobacco Co.*, 130 N. C., 36, 37; *Pressly v. Yarn Mills*, 138 N. C., 421, 430.

(305)

JOHN DOGGETT v. THE RICHMOND AND DANVILLE RAILROAD COMPANY.

Negligence, Proximate and Remote—Damages, Proximate and Remote.

1. Where the negligence of the defendant is proximate and that of the plaintiff remote, an action for damages can be sustained although the plaintiff is not entirely without fault; but if the injury sustained by the plaintiff is the product of mutual or concurring negligence, no action for damages will lie.
2. Where in an action for damages against a railroad company for the destruction of plaintiff's fence by fire it appeared that the plaintiff's fence was three-fourths of a mile from the fence which was first ignited by sparks emitted from an engine of defendant, but was connected with it by a continuous line of fence joined together by intermediate landowners, and that the owner of the fence which originally caught on fire was guilty of contributory negligence: *Held*, that the negligence of plaintiff in connecting with such fence was *remote* and did not affect his right to maintain the action.
3. To render a defendant liable in such case, the injury suffered by the plaintiff must be the natural and probable consequence of defendant's negligence; such a consequence as under the surrounding circumstances of the case might or ought to have been foreseen by the wrongdoer as likely to result from his action.
4. Where a fire is negligently kindled, and by reason of some intervening cause is carried or driven to objects which it would not otherwise have reached, the destruction of such objects is a remote consequence of the negligence.
5. Where in such action it appeared that the fire caught between 10 and 11 A. M., but had been extinguished in the opinion of those contending with it, who had left it, and thereafter it broke out afresh and was carried to plaintiff's premises: *Held*, that the injury was *remote*, and that plaintiff cannot recover.

6. In such case, if there was any intervening negligence in the effort to extinguish the fire either by the intermediate landowners or their neighbors who assembled for that purpose, when their endeavors properly executed might have been successful, the plaintiff cannot recover.

7. In such case, when the danger is imminent, the law imposes the burden upon the plaintiff to show that he was not negligent.

(306) ACTION for damages, tried at December Special Term, 1876, of GUILFORD, before *Kerr, J.*

It was alleged that by reason of sparks of fire emitted from an engine of defendant company, a lot of cross-ties on the side of the track were ignited; that the wind blew the fire to a fence of one Troxler, which was consumed; that in its course, and before it could be controlled, it burned about 256 panels of the plaintiff's fence; and that the defendant had neglected to provide proper safeguards and appliances to prevent injury from sparks, as aforesaid. To recover damages for the injury resulting from this alleged negligence, the plaintiff brought this action, and the defendant denied the allegations of the complaint. The facts set out in the opinion are deemed sufficient to an understanding of the points decided. The jury found that the injury was caused by the negligence of the defendant. Judgment for plaintiff. Appeal by defendant.

Dillard & Gilmer for plaintiff.
J. T. Morehead for defendant.

BYNUM, J. 1. The plaintiff was not in the first instance guilty of contributory negligence. The rule is that when the negligence of the defendant is proximate and that of the plaintiff remote, the action can be sustained, although the plaintiff is not entirely without fault; but if the injury is the product of mutual or concurring negligence, no action for damages will lie. Apply these principles to this case.

The plaintiff's fence was three-fourths of a mile from the origin of the fire, but was connected with the fence first ignited by a continuous line of fence joined together by the intermediate landowners.

Chilcutt's fence, which first caught fire, was located on the defendant's right of way, and in close contiguity with the defendant's roadbed. It was incumbent on Chilcutt to keep the fence in repair, and his negligence in failing therein disabled him from recovering for his injuries,
(307) because he was contributory thereto. But Chilcutt's negligence does not affect the right of the plaintiff to maintain this action, although he negligently and voluntarily connected his fence with that of Chilcutt, who was in default. The reason is that the plaintiff's negligence was remote, while Chilcutt's was proximate. The plaintiff's fence was distant and only connected with Chilcutt's by the intermediate fences of two other persons, and we know of no rule of law which re-

quired that the plaintiff should follow up and examine all the fences which he joined, and before he joined them, to see if any of the proprietors by any contributive negligence had disabled themselves from recovering damages for injuries sustained by the negligence of the defendant.

If the plaintiff's negligence contributed directly to the injury, it is well settled that he cannot recover; but it is equally well settled that when he is only remotely and unconsciously negligent he is entitled to redress for all injuries inflicted by another, when by the latter the injuries could have been avoided by reasonable diligence. Whart. on Neg., ch. 9; *Stule v. Burkhardt,* 104 Mass., 59; *Hubbard v. Thompson,* 109 Mass.; *Kellogg v. R. R.,* 26 Wis., 224.

2. The damage, was it proximate or remote? To render the defendant liable, the injury must be the natural and probable consequence of the negligence—such a consequence as under the surrounding circumstances of the case might or ought to have been foreseen by the wrongdoer as likely to result from his act. But where a fire is negligently kindled, and by reason of some other intervening cause it is carried or driven to objects which it would not otherwise have reached, the destruction of such objects is a remote consequence of the negligence.

"A man's responsibility for his negligence," it has been well said, "must end somewhere. There is a possibility of carrying an admittedly correct principle too far. It may be extended so as to become a *reductio ad absurdum* so far as it applies to the practical business (308) of life." *Hoag v. R. R.,* 80 Penn. St., 182; *R. R. v. Hope, ib.,* 373.

Now, what was the probable consequence of the fire here, such as the defendant would have a right to expect? There were four fences owned by four separate proprietors, and the fourth proprietor is he who brings this action, and whose fence was distant three-fourths of a mile from the point of negligence. Instead of these fences being disconnected, each surrounding the land of its own proprietor, as the defendant had a right to expect, they were linked together in a continuous chain up to the source of danger, forming, as it were, a fuse leading from the fire to the magazine, the plaintiff's fence. The fire first ignited Chilcutt's fence, and was thence communicated to the next, and the next, and finally the plaintiff's. The defendant had the right to expect the destruction of Chilcutt's fence, because that was the natural and probable result of the fire; but the defendant had no right to expect the destruction of the other fences, nor is there any evidence that they would have been destroyed had each been disconnected and surrounding the premises of its owner. The fire only followed the continuous line of fence. The defendant could no more anticipate that the fire would reach the premises of the plaintiff than the latter could anticipate that his voluntary act in

joining his fence to Chilcutt's would be the means of drawing the fire upon himself. But the decision is not put upon that ground, but another.

The fire caught between 10 and 11 o'clock A. M. At 3 P. M. it had not reached the fence of the plaintiff, but, on the contrary, the evidence is that the persons who had been contending with the fire along
(309) the line of fence supposed they had extinguished it before it reached the plaintiff's property, and had retired from the scene of action.

How long it was after 3 o'clock P. M., that the smoldering fire broke out afresh and was carried to the plaintiff's fence is not stated, nor how it reached there, except the conjectural cause, that it was carried by the force of the wind. It is at this point that the intervening cause comes in and establishes the dividing line between proximate cause, which renders the defendant liable, and remote cause, which does not.

The fire had been checked and was supposed to have been extinguished by those who had been contending with it, and they had retired from the ground.

Here was a cessation of the cause—a rest, an interval, of what duration is not stated. What occurred afterwards, resulting in the plaintiff's injuries, was remote damage, which could not be reasonably foreseen or anticipated by the defendant as a necessary or probable result of the first negligence. And in point of fact, those who were upon the ground, and the witnesses and the actors at the point of conflagration, and whose judgment is entitled to most weight, did not anticipate a further spread of the fire. These persons were the neighbors and probably the owners of the fences on fire, and as such were most deeply interested in securing themselves against present and future danger.

If they did not contemplate a renewed outbreak of the fire, upon no reasonable hypothesis can it be assumed that the defendant contemplated it as a necessary or probable result of the first cause. The facts do not constitute such a continuous succession of events so linked together as to become a natural whole, which would make it a case of proximate damages; but the chain of events, by the temporary cessation and extinguishment of the fire, was so broken that it became independent; and the final result cannot be said to be the natural and probable consequence of the primary cause, the negligence of the defendant. The
(310) maxim here applies, *causa proxima, non remota, spectatur. R. R. v. Hope,* 80 Penn., 373; 12 Mo., 366; *Webb v. R. R.,* 49 N. Y., 421; *Perdy v. R. R.,* 98 Mass., 415.

The second burning did not necessarily follow the first, because of the intervening arrest of the progress of the fire. But even supposing that the progress of the flames had been continuous, if there was any intervening negligence in the effort to extinguish the fire either by the inter-

mediate owners of fences or by the neighbors who assembled for that purpose when their endeavors properly exerted might have been successful, the entire weight of authority is that the plaintiff cannot recover. Whart. on Neg., secs. 148 to 155, and the authorities cited.

The law looks to proximate and not the secondary or remote cause. The first lasted from between 10 and 11 A. M. and 3 P. M. in the month of April, a time of year when all persons engaged in agriculture are out and employed upon their farms. This was a thickly settled neighborhood, as it would appear from the number of fence owners in the space of three-fourths of a mile. Such a fire of such a duration and extent could not escape the attention of the community, and in fact did not, as a sufficient number assembled to extinguish the fire, and did, as they supposed. How long was it from 3 P. M., when the fire was subdued, to the time when it rekindled? Whether one hour or five, does not appear. What was the distance from the point of its suppression to the fence of the plaintiff where it was set on fire? Did the wind increase in violence and blow the flames or sparks over the intervening space, or was the fence reached by the continuous burning of the antecedent fences? Where was the family or servants of the plaintiff (he himself was sick), that a fire should rage in such proximity for four or five hours without their efforts to extinguish it?

The danger was imminent, and the law imposes the burden (311) upon the plaintiff of showing that he was not negligent. If either his family, servants, or the owners of the preceding fences stood at their plow handles and beheld the destruction of their property when timely exertions would have saved it, the law will not suffer them to throw the loss resulting from their own apathy upon the defendant. His Honor did not present the case to the jury in this view, but instructed them that "notwithstanding some of the witnesses thought the fire had been extinguished at two points, yet if they believed that notwithstanding the efforts of the neighbors to stop it, it continued to burn and was carried by the winds to and consumed the plaintiff's fence, he was entitled to recover." This charge is hardly supported by the evidence. There is no evidence set out in the record that the neighbors were unable to arrest the progress of the fire, but the evidence is, they had extinguished it, as they supposed, and that the fire continued to burn after they left the place.

While from the meager and not very discriminating statement of facts before us we cannot say as a matter of law that the plaintiff cannot recover, yet if upon another trial the plaintiff cannot present a better case, we should then be of opinion that he cannot recover.

Upon a second trial, attention should be directed to these questions: Was the burning of Troxler's and Faucett's fences, one or both, the

necessary or probable consequence of setting fire to Chilcutt's? Was there such an extinguishment of the fire before it reached the plaintiff's fence as subjected it to the control of those who were endeavoring to suppress it? Did the fire revive and reach the plaintiff's fence in consequence of the negligence or want of reasonable precaution, either on the part of the plaintiff, his family, or servants, or on the part of any of the antecedent fence owners, their servants, or families, or from what cause?

These suggestions are not intended as the issues which should (312) govern the trial, but only as an indication of the general scope of the next investigation.

The main object is to ascertain the facts. When they are ascertained, the question of negligence is for the court. In respect to the several fence owners and their duty and responsibility in the presence of the fire, this rule has been laid down by high authority: "A man in his senses, in face of what has been aptly termed a 'seen danger,' that is, one which presently threatens and is known to him, is bound to realize it, and to use all proper care and make all reasonable efforts to avoid it; and if he does not, it is his own fault, and he having thus contributed to his own loss or injury, no damages can be recovered from the other party, however negligent the latter may have been." *Kellogg v. R. R.*, 26 Wis., 223; Shearman and Redfield on Neg., sec. 34, note 1.

PER CURIAM. *Venire de novo.*

Cited: Gunter v. Wicker, 85 N. C., 312; *Farmer v. R. R.,* 88 N. C., 570; *Sellars v. R. R.,* 94 N. C., 659; *Cornwall v. R. R.,* 97 N. C., 15; *Grant v. R. R.,* 108 N. C., 471; *Taylor v. R. R.,* 109 N. C., 236; *Smith v. R. R.,* 114 N. C., 752; *Jeffress v. R. R.,* 158 N. C., 222; *Hardy v. Lumber Co.,* 160 N. C., 122, 123, 125.

(313)

G. OBER & SON v. WILLIAM H. SMITH.

Contract—Vendor and Vendee—Delivery to Carrier—Bill of Lading.

1. As soon as an order for goods is accepted by the vendor, the contract is complete without further notice to the vendee; and such contract is fully performed on the part of the vendor by the delivery of the goods in good condition to the proper carrier.
2. A delivery to a carrier designated by the vendee is of the same legal effect as a delivery to the vendee himself; if no particular route or carrier is indicated by the vendee, it is the duty of the vendor to ship the goods ordered "in a reasonable course of transit."

3. The fact that no bill of lading was sent to the vendee does not affect the right of the vendor to recover the price of the goods.

RODMAN, J., dissenting.

APPEAL from *Buxton, J.*, at Spring Term, 1877, of HALIFAX.

The plaintiffs brought this action to recover the price of a certain amount of guano which they had sold to the defendant. The material facts found by the referee, to whom the case was referred, are these: The plaintiffs manufacture and deal in guano in the city of Baltimore, and the defendant was engaged in farming near Edwards Ferry on the Roanoke River in North Carolina, and one Shields was the plaintiffs' agent for selling guano in said State. Early in April, 1873, the defendant asked said agent if he could fill an order for guano in time for the planting season of that year, who replied that he did not know, but if the defendant would take the chances of getting it in time, he would order it of the plaintiffs. The defendant told him to order it "any-way," and have it consigned to him (defendant) at Edwards Ferry. Accordingly, on the 12th of the same month the plaintiffs delivered the article ordered to the Baltimore Steam Packet Company, at Baltimore, consigned to the defendant at Edwards Ferry. The guano was, shortly (314) thereafter and in a reasonable course of transit, put on board the steamer "Silver Wave," then making regular trips on the Roanoke River, and in such trips passing said Edwards Ferry. At the time of the shipment the plaintiffs forwarded a bill of lading to said agent, but neither one presented the bill of lading to the defendant, who had no knowledge of the shipment until the following November, when payment for the guano was demanded. There was no warehouse at said Ferry, and what became of the guano does not appear, except that it was landed at some point on said river. The defendant never received it, and bought other guano in its place. Some time after the shipment—whether before or after the purchase of other guano, does not appear—the defendant paid said agent the freight on said guano. He was in the habit of paying large freight bills, and having confidence in the agent, he paid without much scrutiny. In regard to the quantity, quality, price, and name of the article, the order of the defendant was definite, and in these respects it was strictly complied with by the plaintiffs.

Thereupon the referee held that the defendant was not liable, and his Honor sustained the ruling, and the plaintiffs appealed.

Spier Whitaker for plaintiffs.
T. N. Hill for defendant.

FAIRCLOTH, J., after stating the facts as above: Upon these facts it is our opinion that as soon as the order or proposition of the defendant

was accepted, the contract was complete without further notice, and that it was fully performed on the part of the plaintiffs when they delivered the guano in good condition to the steamboat company,
(315) when the title vested immediately in the defendant, and that consequently the plaintiffs ought to recover. This rule would be varied by a different understanding or agreement, for there is no rule of law to prevent the parties in cases like the present from making whatever bargain they please; and if it appears from the conduct of the parties or from circumstances that either party intended otherwise, then the effect would be the same. If it appeared that the defendant intended no contract until notice of acceptance of his proposition, or that he intended to assume no liability until the plaintiffs delivered the goods at the place designated, or that the vendor intended to control the goods and to retain the *jus disponendi* by sending a bill of lading to his agent or to a third person, with instructions not to deliver until the goods are paid for, then in such cases the title would not vest in the purchaser by the delivery to the carrier. The authorities are numerous, both English and American, to the effect that a delivery of goods to a carrier designated by the purchaser is of the same legal effect as a delivery to a purchaser himself, and that it is not necessary that he should employ the carrier personally, or by some agent other than the vendor. If, however, no particular route or carrier is indicated by the vendee, then it is the duty of the vendor to ship the goods "in a reasonable course of transit," which was done here, and when he has so delivered the goods to the carrier, his duty is discharged, and if the goods are lost, the purchaser is bound to pay him the price. If it appear that plaintiffs failed to comply with instructions in any material respect, or that any act or instruction of theirs contributed in any way to the nondelivery at the proper destination, then they could not recover; but it is manifest that the nondelivery was not owing to the negligence of the plaintiffs, and was probably occasioned by the fault of the carrier. It is contended, however, that the plaintiffs cannot recover, because they sent no bill of lading to the defendant.
(316) This fact does not alter the contract. Such bills as the *indicia* of property are useful and convenient for transfers and other commercial purposes, but they are not essential in contracts of sale and delivery like the present; and it is to be noted that a bill of lading was sent to the agent through whom the defendant's order came to plaintiffs. The principle of this case was decided in *Crook v. Cowan,* 64 N. C., 743.

There is error. Judgment will be entered in this Court in favor of the plaintiffs for the debt and costs.

RODMAN, J., dissenting: I cannot concur in the opinion of the Court. But for that opinion, I should have thought the question too plain for

doubt. My view is this: The defendant, through the agent of the plaintiffs, whom he made his own agent for the purpose of communicating his proposition to the plaintiffs, proposed to buy of the plaintiffs five tons of guano on a certain credit. An acceptance of his offer was never communicated to him until about six months afterwards, when he was called on to pay for it. He never received it. In the interval between the offer to buy and the demand of payment, the guano had been delivered at Baltimore to a common carrier, consigned to the defendant at Edwards Landing on the Roanoke River, and in some unknown way, and at some time unknown, lost or destroyed. The doctrine is elementary, and, I take it, is not doubted by anybody, that an offer to buy does not constitute a sale or a contract of any sort, until it is accepted and the acceptance made known to the proposed buyer. While I suppose that this principle is not doubted, it is so important to have, and bear in mind, a clear conception of it, that I cite a few lines from Benjamin on Sales, respecting it:

"To constitute a valid sale, there must be a concurrence of the following elements: (1) Parties competent to contract; (2) *Mutual assent,*" etc., sec. 1. "But the assent must, in order to constitute a valid contract, be mutual and intended to bind both sides. It must also exist at the same moment of time. A mere proposal by one man obviously constitutes no bargain of itself. It must be accepted by another," (317) etc., section 39. See, also, section 41.

Where no time is limited for acceptance of the offer, it should be accepted, if at all, within a reasonable time, and unless it is so accepted, and *the acceptance notified* to the person making the offer, he will not be bound. *Metcalf, J.,* in *Craig v. Harper,* 3 Cush., 158, 160. See, also, the other cases cited in note Q to section 41 of Benjamin on Sales.

I do not conceive it to be necessary to accumulate authorities on this point, that an assent is nothing until it is communicated, but as it is the foundation of my opinion, and although admitted in the opinion of the Court as an abstract principle, seems to be practically disregarded in coming to its conclusion, I will refer to the familiar cases of *Linsdell v. Adams,* 1 B. and Ald., 681; *Dunlop v. Higgins,* 1 H. L. Cases, 381, and others of that class relating to contracts by letters, which may be found in all the text-books. All these cases assert that until the assent is communicated there is no sale; they differ only as to whether the assent is communicated when the letter accepting an offer is deposited in the post-office, or not until it reaches its address. They agree that until one or the other takes place, the property does not pass, and the offer may be withdrawn. See Metcalf on Contracts, 14; and 3 Johns., 534; 3 Cush., 158; 8 Allen, 566.

No doubt, the assent may be communicated by sending the article;

but it is not thus communicated until the article is received; and the property and risk are in the shipper until it is received; and if it be lost, the loss is his. In my opinion, there never was a completed sale of this guano to the defendant; no property in it was ever in him, because it was lost before he was informed of the acceptance of his offer by the plaintiffs.

(318) 2. It is said, however, that the defendant was notified of the acceptance of his offer by the delivery of the guano consigned to him on board the steamer "Silver Wave," a common carrier, at Baltimore within a reasonable time after the receipt of his offer, and this is the main question in this case. I agree that the delivery would have passed the property to the defendant, and made him liable for the price, if he had ever received the article or *if at the time a bill of lading had been forwarded to him,* and, perhaps, even if a notice of the acceptance of his offer and of the shipment had been sent to him. But I cannot believe that in the absence of any notification whatever of the acceptance of his offer, otherwise than by the delivery to the common carrier, the property passed to the defendant, so as to make him responsible for a subsequent loss, or that he became bound for the price. It seems to me that such a rule would be unreasonable and unjust. The plaintiffs assented to the offer, but their assent, not being communicated to the defendant, was a mere secret assent, which amounted to nothing. If the property had passed by a communicated assent, then the plaintiffs would have been the defendant's agents to ship the guano; the master of the steamer would have been the defendant's agent to receive it; and any loss not insured against would have been their loss. But the master of the steamer had never been made the agent of the defendant *to receive the plaintiffs' acceptance of his offer to buy.* No authority was cited on the argument, my learned brother refers to none, and I have found none, and I therefore feel justified in assuming that none can be found, which holds that a common carrier is the agent of one who offers to buy, to receive notice of the acceptance of this offer, when no notice of such acceptance is otherwise communicated to him and the goods are never actually delivered. It seems to me that the doctrine that he is *an agent for that purpose* is altogether new, and unknown to the commer-

(319) cial law. What few authorities bearing on the question I have found are opposed to it.

A bill of lading is the ancient, usual, and almost constant *indicium* of property in goods shipped; and that, or some equivalent document, is absolutely necessary to enable a vendee to dispose of the goods before arrival, or to enable him or his vendee to demand them from the master of the ship, or to protect the master in delivering them. It is not necessary to say that the taking and mailing to the vendee of a bill of lading

is necessary to vest in him the property in the goods shipped. It may be that an assent to his offer to buy, communicated to him and followed by a delivery to a carrier, would be sufficient; and where no bill of lading is taken, the production of a notice of such an acceptance might justify the master in delivering the goods to the vendee, just as his knowledge of the fact of the sale, acquired in any other way, would, for a carrier may always deliver goods to their true owner. But it seems clear that when a supposed vendee has nothing to show an acceptance of his offer, and no document of title whatever, even although no bill of lading had been signed by the master, he is not in a position to demand the goods from the master, and the master would deliver them at his own risk.

A fortiori, when the shipper does take a bill of lading, as he did in this case, the master would deliver the goods to any one but the holder at his peril, and no one but such holder (in this case the agent of the plaintiff) would be entitled to demand them. *Lickbarrow v. Mason,* 2 T. R., 63, Smith L. C., notes.

As no notice was ever given to the defendant that his offer was accepted, and a bill of lading was sent to the plaintiff's agent, which was never delivered to the defendant, and of which he was never informed, the property never vested in him, and he was never liable for the price. The plaintiffs could have had no object in sending the bill (320) to their own agent instead of the defendant, except to prevent the property from vesting in the defendant until the agent thought proper to deliver the bill to him.

Mr. Benjamin, after stating the general rule that a delivery to a carrier is a elivery to the purchaser, says in section 694: "But the vendor is bound, when delivering to a carrier, to take the usual precautions for insuring the safe delivery to the buyer." He cites the case of *Clarke v. Hutchins,* 14 East, 475, in which the vendor had neglected to inform the carrier of the value of the goods, in consequence of which the vendee was disabled from recovering from the carrier upon their loss, and it was held that the vendor could not recover their price; that the vendor had not made a delivery of the goods, not having "put them in such a course of conveyance as *that in case of a loss the defendant might have his indemnity against the carriers.*"

Kent (vol. 2, p. 500), after saying that a delivery to a general carrier is ordinarily a delivery to the vendee, proceeds: "But if there be no particular mode of carriage specified, and no particular course of dealing between the parties, the property and the risk remain with the vendor while in the hands of the common carrier. (*Coats v. Chaplin,* 2 Gale and Davison, 2 B., 552.) The delivery to the agent must be so perfect as to create a responsibility on the part of the agent to the buyer, and

if the goods be forwarded by water, the vendor ought to cause them to be insured if such has been the usage, *and he ought in all cases to inform the buyer with due diligence of the consignment and delivery.*" For this last proposition he cites Bell on the Contract of Sale, a Scotch work not accessible to me; but the good sense of the rule, independent of the authority of Bell and Kent, certainly commends it to adoption.

In 1 Chitty on Contracts, 11 Am. Ed., p. 613, it is said: "But if the goods be lost, delivery to a carrier is not sufficient to charge the (321) vendee in an action for the price thereof, unless the vendor exercise due care and diligence, so as to provide the vendee with a remedy over against the carrier; as if he neglect to book, or to take a receipt for the goods," etc. It is here clearly implied that he must send the receipt to the vendee in order to charge him; for if the vendee is never informed of the receipt, how can it benefit him?

In this case the usual precaution would have been to take a bill of lading, which the vendor did, and send it to the vendee, which he did not. By his failure to furnish the defendant with any evidence of property in the goods, he deprived him of all means of indemnity against the carrier. The defendant is compelled to pay for goods that he never received, and never was informed that he had any property in, and that, in fact, as I think, he never had a property in. If the plaintiffs had conformed to the known and familiar usages of trade, the defendant would either have received the goods or would have had redress against the carrier. It is said, however, that he could have sued the carrier and recovered upon the proof made in this case. Suppose for a moment that he might; but was he compelled to pay for the goods and take on himself the burden of an uncertain suit? I think not, and that the consequences of the plaintiffs' neglect to observe the known usages of trade should fall on themselves. But the defendant never could have recovered in a suit against the carrier, because the property in the goods was never vested in him.

The rule now sought to be introduced would be most inconvenient. As the defendant never received notice that his offer had been accepted, he had a right to presume that it had not been. He was under no duty to watch the arrival of vessels at the landing to which he had directed the guano to be consigned. If that duty laid on him at all, it must have adhered indefinitely. Every man who writes or causes to be (322) written a letter requiring a reply may reasonably be required to inquire for the reply at his post-office in due course of post. And every man who has been informed that goods have been shipped to him may reasonably be required to take notice, for a reasonable time, of the arrivals at the port of consignment; but when he has received no such information, and has no reason to think that any goods have been

shipped to him, it seems almost absurd to demand of him to be constantly on the lookout for an indefinite time, in the language of the ancient subpœna in equity, "neglecting all other business."

It seems to me that the introduction into commercial law, as it has heretofore been understood, of what I cannot help thinking a novel and unreasonable principle, will not promote the interests of either agriculture or commerce.

PER CURIAM. Reversed.

Cited: Gwyn v. R. R., 85 N. C., 431; *R. R. v. Barnes,* 104 N. C., 27; *Bank v. Miller,* 106 N. C., 349; *Cowan v. Roberts,* 134 N. C., 421; *Stone v. R. R.,* 144 N. C., 229; *Gaskins v. R. R.,* 151 N. C., 21; *Pfeifer v. Israel,* 161 N. C., 414.

Distinguished: S. v. Wernwag, 116 N. C., 1063; *Hunter v. Randolph,* 128 N. C., 92; *Sims v. R. R.,* 130 N. C., 557.

(323)

R. G. LEWIS, SURVIVING PARTNER OF LEWIS & MOSHER, v. W. D. ROUNTREE & CO.

Warranty—Specific Description—Action for Breach—Waiver.

1. Where L. purchased of R. a certain number of barrels of rosin, under the following contract, viz.: "Received of L. $700 in part payment of 500 barrels of strained rosin, to be delivered," etc., and thereupon at the place of delivery L. examined and selected the number purchased; and the barrels so selected afterwards proved in a great measure not to be "strained rosin": it was *Held*, that the agreement of R. to deliver, etc., amounted to a warranty on his part that the rosin received by L. should be *strained rosin.*
2. In such case the fact that L. had an opportunity to inspect the rosin before or when it was delivered, and did in fact select the particular barrels purchased, did not amount to a waiver of the warranty that they should be of the specific description.
3. Where goods are warranted to come within a specific description, the vendee is entitled, although he does not return them to the vendor or give notice of their failure to come within the description warranted, to bring an action for breach of warranty.

APPEAL from *Buxton., J,* at June Special Term, 1877, of WAKE.

The case states: This suit, in form an action of trespass on the case in assumpsit, was instituted on 11 September, 1866, and in its present aspect is substantially a controversy in respect to 517 barrels of strained rosin bought by the plaintiffs from the defendants on 10 October, 1865,

at Wilson, North Carolina, and paid for at the agreed price of $3.50 per barrel. The plaintiffs complain that only 116 barrels came up to the description of the article bought and paid for, and that the remaining 401 barrels, in respect to which damages are claimed, were not strained rosin, but a greatly inferior article known as dross rosin.

(324) The case was referred to Samuel A. Ashe, Esq., to whose report both parties filed exceptions. The facts found by him are, in brief, as follows: In October, 1865, the plaintiffs bought and paid for 517 barrels of strained rosin, under a contract in words and figures following: "Received of R. G. Lewis $700 in currency, in part payment of 500 barrels of strained rosin at $3.50 per barrel, said rosin to be delivered to said Lewis at the railroad depot in Wilson, N. C., within three weeks from date, 10 October, 1865." (Also like receipt for another lot.) Signed by the defendants. The barrels of rosin were selected by the plaintiffs on 25 October, 1865, at said depot, out of a large lot (variously estimated at from 2,000 to 4,000 barrels) belonging to the defendants. They selected their lot of 517 barrels in the absence of the defendants, but with their consent, having been accompanied to the depot by one of the defendants, who left them at work, with implements to cut in and inspect the barrels; and they did inspect such as they chose, and selecting about twenty samples of a superior grade of strained rosin, marked their barrels with the initials of their firm, "L. & M," and shipped them to New York, where they represented the whole lot as corresponding with the samples exhibited, and obtained from Dollner, Potter & Co., in December, 1865, an advance of $3,000. Upon inspection in New York, the lot did not correspond with the samples, and all of it was not even strained rosin. Dollner, Potter & Co. then sued these plaintiffs, and to settle with them, the plaintiffs brought this suit and transferred their interest in it to Dollner, Potter & Co. There was no evidence of fraud on the part of the defendants, but there was evidence that in the large number of barrels from which the plaintiffs made their selection there were a number of barrels of strained rosin greatly in excess of 517.

The referee held as a matter of law that said contract contained a warranty that the rosin agreed to be delivered should be mer-
(325) chantable as strained rosin; that this warranty was broken as to 401 barrels, and the plaintiffs were entitled to recover; that the measure of damages was the difference between the value of strained rosin at Wilson on the day of the delivery and the value of the rosin actually delivered on that day; and that the damages so assessed amounted to $327, with interest from date of demand, to wit, the date of the service of the summons in this action.

His Honor being satisfied that the plaintiffs did not get the number of barrels of strained rosin because of their own mistake, and by reason

of the fact that the suit was brought eleven months after the sale without any notice to the defendants of the mistake, or demand on them to supply other rosin in place of the inferior rosin which the plaintiffs, relying on their own judgment, selected and carried off and sold, reversed the decision of the referee, and gave judgment against the plaintiffs, from which they appealed.

E. G. Haywood and D. G. Fowle for plaintiffs.
George H. Snow for defendants.

RODMAN, J. We think the judge came to a wrong conclusion. The defendants agreed to deliver 517 barrels of strained rosin, which clearly amounts to a warranty that the article which they deliver is of that specific description. It may be called a condition precedent, and so it is, for the purpose that the vendee is not obliged to receive the article unless it comes within the description. But it is more than that, for it is held, as will presently be seen, that after the vendee has received and retained the articles, he may recover damages if they do not come within the specific description; the description must therefore be a warranty, or what practically is equivalent to it. Benjamin on Sales, secs. 600, 647. Of course, it is not meant that words of description are always a warranty. But the cases in which that is held have all something special to take them out of the rule, and to show that in those (326) cases it was not so intended.

That plaintiffs had an opportunity to inspect the rosin before or when it was delivered, and did in fact select the particular barrels out of a large number, did not amount to a waiver of the warranty that it should be of the specific description. This is reasonable. It is almost impossible, or at least very difficult, to tell from any inspection of a barrel of rosin, short of breaking it up into fragments, whether it contains dross, that is, chips, dirt, etc., or not. And to break it up makes it unfit for transportation, and unmarketable. All the above propositions are supported by authority.

In *Jones v. Just,* L. R., 3, Q. B., 197, *Mellor, J.,* says: "In general, on the sale of goods by a particular description, whether the vendee is able to inspect them or not, it is an implied term of the contract that they shall reasonably answer such description, and if they do not, it is unnecessary to put any other question to the jury."

The judge refers to the case of *Josling v. Kingsford,* C. B., N. S., 447 (106 E. C. L.), in which it is distinctly held that even if the vendee has an opportunity to examine the goods before receiving them, yet if the defect be not patent, he may receive them, and maintain an action upon the warranty that they did not come within the specific description.

Examination, or what is the equivalent, an opportunity of examination, is a waiver of any implied warranty as to the quality of the goods, but not that they shall be of the specific description.

On the argument, *Lush, Q. C.,* for the vendor, who was the defendant, in reply to a remark of *Erle, C. J.,* said: "That raises the broad question which has never yet specifically been decided, viz., whether upon a sale of goods where the buyer has an opportunity of inspecting them, and buys, relying on his own judgment, any warranty can be implied either as to quality or as to the thing being that which it is (327) represented to be." The decision was as above stated. This case is on all-fours with the one before us, and both as reasoning and, on a question of this sort, as authority, must be deemed conclusive. See, also, *Allen v. Lake,* 18 Q. B., 560; Benjamin on Sales, sec. 600, note p., sec. 647.

It is said, however, that as soon as the plaintiff discovered that a part of the rosin did not come within the description of strained rosin, which he did after it arrived in New York, he was bound to notify the defendants of the defect and to offer to return the rosin to them. We think this is answered by *Poulton v. Lattimore,* 9 B. and C., 259 (17 E. C. L., 373). In that case *Littledale, J.,* said: "I am of opinion that where goods are warranted, the vendee is entitled, although he do not return them to the vendor or give notice of their defective quality, to bring an action for breach of the warranty," etc. It is true, in that case the plaintiff declared upon a breach of warranty as to quality; but there can be no difference in principle between such a warranty and one as to the identity of the article. Benjamin on Sales, secs. 897 and 899, note r. The only result of a failure to offer to return the goods, or to notify the vendor of their defective quality, is to raise a presumption that the complaint of the quality is not well founded. In this case the plaintiff had paid for the goods, and the property in them had passed to him. The defendant was under no obligation to receive them back and return the price. The case of *Cox v. Long,* 69 N. C., 7, supports this view. The plaintiff had contracted and paid for shingles of certain dimensions, and had received and used those delivered with knowledge that they did not correspond to the warranty, without having offered to return them; and it was held that he was entitled to recover (328) damages for breach of the warranty. We think the judge erred in holding that the plaintiff was not entitled to recover.

PER CURIAM. Reversed.

Cited: Lewis v. Rountree, 79 N. C., 123; *Lewis v. Rountree,* 81 N. C., 20; *McKinnon v. McIntosh,* 98 N. C., 92; *Love v. Miller,* 104 N. C., 586; *Alpha Mills v. Engine Co.,* 116 N. C., 802; *Ferrell v. Hales,* 119

N. C., 213; *Kester v. Miller, Ib.*, 478; *Finch v. Gregg*, 126 N. C., 179; *Reiger v. Worth*, 130 N. C., 269; *Allen v. Tompkins*, 136 N. C., 210; *Parker v. Fenwick*, 138 N. C., 217; *Wrenn v. Morgan*, 148 N. C., 105; *Woodridge v. Brown*, 149 N. C., 304; *Robertson v. Halton*, 156 N. C., 220; *Hodges v. Smith*, 158 N. C., 261; *Underwood v. Car Co.*, 166 N. C., 460; *Tomlinson v. Morgan, Ib.*, 560; *Winn v. Finch*, 171 N. C., 275.

ALEXANDER H. LINDSAY v. GEORGE J. SMITH AND JOSEPH HOSKINS.

Contract—Illegal Consideration—Agreement to Stop Criminal Prosecution.

1. A contract founded upon an agreement to stifle or discontinue a criminal prosecution of any kind is void.
2. Where for a single consideration a covenant is entered into to perform two separate acts, one legal and the other illegal, the whole is void. Therefore, where the defendant for a single consideration covenanted under the penalty sued for to ditch the plaintiff's land and to stop the prosecution of an indictment pending against him for maintaining a public nuisance: *Held*, in an action for the penalty, that the plaintiff was not entitled to recover.

ACTION for breach of covenant, tried at Fall Term, 1877, of GUILFORD, before *Buxton, J.*

The case is sufficiently stated by *Mr. Justice Bynum* in delivering the opinion of this Court. Upon the hearing in the court below, his Honor sustained the demurrer of defendants and dismissed the action. Judgment for costs. Appeal by plaintiff.

J. N. Staples and Merrimon, Fuller & Ashe for plaintiff. (329)
J. A. Gilmer for defendants.

BYNUM, J. This is an action for a breach of covenant. The defendants demur to the complaint, and the facts are these: On 17 February, 1874, an indictment was pending in the Superior Court of Guilford County against the plaintiff Lindsay, for erecting and maintaining a public nuisance by constructing a dam across a certain creek and ponding back the water thereof, which thereby became stagnant, fetid, and unwholesome, to the common nuisance of the citizens. That on said 17 February the covenant sued on was entered into, whereby the defendants covenanted, under the penalty sued for, to cut, maintain, and keep

in repair a certain ditch through the lands of the plaintiff; and that the plaintiff covenanted that when the work was done he would pay the defendants $50; and it was further covenanted as follows: "And it is further agreed by all the parties hereto, in consideration of the premises, that the indictment now pending in the Superior Court of Guilford County, against the said Alexander H. Lindsay, found at February Term, 1873, shall be discontinued and not proceed, and the prosecution thereof stopped without cost to the said Lindsay." . . . "And it is further agreed and understood by all the parties hereto, that this agreement is to be of no binding force on any of said parties whose names are signed hereto until and unless the indictment hereinbefore spoken of shall be discontinued without cost to the said Lindsay." And this covenant is signed by the plaintiff and defendants.

Assuming this covenant to have been broken by the defendants, do these facts constitute a cause of action?

(330) The general doctrine was admitted by the plaintiff's counsel, that no executory contract the consideration of which is *contra bonos mores,* or against the public policy or the laws of the State, can be enforced in a court of justice. It was further admitted that when the consideration of a contract is the compounding a felony, or the suppressing a prosecution of an offense strictly public in its character, such a contract cannot be enforced. But it was contended that this doctrine applied only to felonies, or at most to public misdemeanors, and that it had no application to offenses, though indictable, yet private in their nature, as affecting an individual or a community, as in this case. In our State it has been decided directly otherwise. *Vanover v. Thompson,* 49 N. C., 485. There, Thompson executed his promissory note to Vanover, "to be valid and legal, provided the said Vanover shall not appear as a prosecutor or witness against James Thompson, with whom the said Vanover has a controversy; now if the said Vanover shall thus appear, this note to be null and void." It does not appear what was the offense of Thompson, but a State's warrant had been issued against him by a justice of the peace, for some offense personal to Vanover, who failing to appear as a witness, the proceedings were dismissed. The plaintiff was nonsuited, and it was then pronounced as a well settled principle that all contracts founded upon agreements to compound felonies, or to stifle prosecutions of *any kind,* are void and cannot be enforced. And in *Garner v. Qualls,* 49 N. C., 223, the consideration of the contract was the suppressing the prosecution for an *alleged* forgery. The obligee procured the bond to be executed by representing that a kinsman of the obligor had committed an indictable offense, and by agreeing not to prosecute. It was held that the bond was void, *whether any such offense had been committed or not.* This case is, therefore, a conclusive answer

to the objection taken in our case, that the supposed indictment did not charge an indictable offense. In *Garner's case* the obligor *believed* an offense had been committed, and the consideration of the note was to suppress inquiry about it. It is a matter of the gravest (331) public concern that all infractions of the criminal law should be detected and punished. A party cannot take care of his private interest by depriving the State of a witness or an active prosecutor, which is the means relied on for the conviction of offenders; much less can he pollute the very fountains of criminal justice by suppressing an indictment already instituted against him. *Thompson v. Whitman,* 49 N. C., 47; *Ingram v. Ingram,* 49 N. C., 188; *Blythe v. Lovinggood,* 24 N. C., 20.

So in civil cases, all contracts prohibiting parties from bringing an action and all agreements purporting to oust the courts of their jurisdiction; all agreements to pay money to stifle or suppress evidence or to give evidence in favor of one side only, or not to appear as a witness in a civil suit; all contracts, bonds, indemnities, and undertakings tending to induce sheriffs, clerks, jailers, and other public officers to violate or neglect their duty or made to protect them from the consequences of their misconduct, are absolutely null and void as contracts obstructing or interfering with the administration of public justice and as being contrary to the public policy of the law. I Add. on Contracts, sec. 258.

But the defendants' counsel contends with great ingenuity that there are two covenants in this sealed instrument, and that they are *divisible,* part being good and part bad; that the contract of the defendants is to do two things: first, to dismiss the indictment, which is illegal and void, but, second, to cut and keep up the ditch, which is legal and valid, and is the contract for the breach of which the action is brought. In regard to this proposition, the general rule is that if there are several considerations for separate and distinct contracts, and one is good and the other bad, the one may stand and be enforced, although the other fails, under the maxim, *"Utile per inutile non vitiatur."* But where (332) there is but one entire consideration for two several contracts, and one of these contracts is for the performance of an illegal act, the whole is void, as where one sum is to be paid for the doing of a legal and illegal act. Thus, where upon a contract for the hiring and service of a housekeeper at certain agreed wages it appears to have been a part of the contract that the housekeeper should cohabit with her master, the whole will be void and the wages irrecoverable by her. *Rex v. Northingfield,* 1 B. and Ad., 912; *Willyams v. Bullmore,* 32 Beav., 574; 1 Addison on Contracts, sec. 300. In *Alexander v. Owen,* 1 T. R., 227, the case was this: Upon a contract of sale of tobacco, it was agreed that counterfeit money should be taken in payment, and the tobacco having been delivered and the counterfeit money sent, the vendor refused to receive

it, and brought an action to recover the price of the tobacco, but the Court said that the sale could not be held to be good and the payment bad; if it was an illegal contract, it was equally bad for the whole, and the parties being *in pari delicto, melior est conditio defendentis.* Apply these principles to our case. There was but one indivisible consideration moving from the plaintiff, to wit, the sum of $50, and for that consideration the defendants covenant to do two things, the one legal and the other illegal. The consideration cannot be divided and enough of it assigned to support the contract to cut and maintain the ditch, but it, as it were, *per my et per tout,* enters into and supports both promises.

But there is another view equally fatal to this action. A part of the covenant is in these words: "And it is further agreed and understood by all the parties hereto, that this agreement is to be of no binding force on any of said parties whose names are signed hereto until and unless the indictment hereinbefore spoken of shall be discontinued with-
(333) out cost to the said Lindsay." So the validity of the contract is expressly made to depend upon the performance of the very act which makes it invalid, to wit, the dismissal of the indictment. The covenants were not to be binding until the prosecution had been discontinued, and the contract to dismiss it was immoral and void. In such cases the law will leave the parties where it finds them. *Kimbrough v. Lane.* 11 Bush. 556; *Setter v. Alvey,* 15 Kan., 157; 1 Smith Lead. Cases, marg. pages 153-165 and notes; *King v. Winants,* 71 N. C., 469, and 73 N. C., 563.

PER CURIAM. Affirmed.

Cited: Commissioners v. March, 89 N. C., 272; *Griffin v. Hasty,* 94 N. C., 440; *Corbett v. Clute,* 137 N. C., 551; *Annuity Co. v. Costner,* 149 N. C., 298; *Alston v. Hill,* 165 N. C., 258.

---

(334)

JOSEPH W. DOBSON *v.* JOHN G. CHAMBERS, ADMINISTRATOR OF JOHN BRIGMAN.

Partnership—Evidence—Contract—Practice—Amendment.

1. On the trial of an action against B. upon an issue as to whether one W. and B. were partners, there was evidence that W. and B. were together, and had certain stock together; that B. carried a note to bank to be discounted, with a written request from W. that it should be done; that B. said that the money *was for himself and W.;* that they were *buying stock together* and that the money was to be used in buying stock;

that B. afterwards referred to the debt he and W. owed in bank, etc.: *Held*, that the jury were warranted in finding that a partnership existed between W. and B.

2. In such action, where it appeared that the partners requested the plaintiff to pay their debt in bank and promised to repay him, and afterwards their note was taken up by certain accommodation acceptances, which the plaintiff took up with *his* note, which was thereafter paid by him: it was *Held*, that the plaintiff was entitled to recover; and the plaintiff's right to recover is not affected by the fact that he did not expressly contract to take up the defendant's note, or that a considerable period of time elapsed before he did so.

3. The exercise of the discretionary power of the court below, in allowing an amendment to the complaint during the progress of the trial, cannot be reviewed by this Court.

APPEAL from *Schenck, J.*, at Fall Term, 1877, of BUNCOMBE.

The case is sufficiently stated by the *Chief Justice* in delivering the opinion of this Court. There was a verdict and judgment in favor of the plaintiff, and the defendant appealed.

A. T. and T. F. Davidson and Busbee & Busbee for plaintiff.
J. H. Merrimon for defendant.

SMITH, C. J. This action was instituted to recover money (335) alleged to have been paid by the plaintiff for the use of the defendant's intestate and John W. Woodfin, at their special instance and request, and is prosecuted against the defendant alone. John Brigman, the intestate, in June, 1860, was indebted to the Planters and Miners Bank at Murphy by note, to which the said John W. Woodfin and John E. Patton were sureties, in the sum of $6,000 and due at ninety days. On 4 June following, the note was taken up and a new note executed by the same parties, and substituted in its place. The last note was not paid at its maturity, and went to protest, but was afterwards taken up by two drafts, each in the sum of $3,000, dated 5 March, 1861, one payable at ninety, the other at one hundred and twenty days from 20 March, 1861, drawn by R. B. Vance in favor of J. E. Patton on said J. W. Woodfin, which drafts were accepted and indorsed to the bank. At the same time the protested note was transmitted to said R. B. Vance.

On 3 September following, the plaintiff executed his note, with J. W. Woodfin and C. D. Smith as sureties, to the bank in the sum of $6,238.66, the amount then due on the acceptances, payable at six months, in place of the drafts.

This note was replaced by another note executed to the bank by the same parties on 4 March, 1862. John Brigman died on 6 March, 1861. The plaintiff alleges that he executed his own note for the debt due the

bank, upon the agreement of Brigman and Woodfin to reimburse him any money he might have to pay by reason of his said obligation.

This agreement, as also the existence of any copartnership between the defendant's intestate and Woodfin, is denied in the answer.

Issues were thereupon framed without objection, and submitted to the jury, who find: (1) That Brigman and Woodfin did in 1860 request the plaintiff to pay off their note in bank, and promised to repay him if he would do so. (2) That Brigman and Woodfin were part-
(336) ners, and had borrowed the money for which their note was given for partnership business.

Evidence was offered on the trial of the issues, so much only of which will be stated as is necessary to a proper understanding of the defendant's exceptions.

The defendant insisted that there was no evidence of a partnership submitted to the jury, and they were not warranted in finding that any existed. It thus becomes necessary to refer to the testimony given upon the issue.

The plaintiff testified that he last saw Brigman at Asheville in September, 1860, in company with a man called Buckner; that Brigman there let plaintiff have twenty horses and a mule at the price of $2,875, and Woodfin let him have seventeen mules of the value of $2,500; that they had the stock together at Woodfin's house in Asheville, and that the trade with Brigman was made at his house. The witness was not allowed, on objection of the defendant's counsel, to proceed further with the testimony, because both Woodfin and Brigman were dead.

The president of the bank, Mr. Davidson, testified that Brigman brought his note to the bank to be discounted, with a written request from Woodfin that this should be done; that the bank was reluctant to make the loan, as the money was kept for the accommodation of stock-drivers, and Brigman said the *money was for himself and Woodfin,* and *they were buying stock together,* and the money was to be used in buying stock. The loan was made.

Another witness stated that in the fall of 1860 he got four mules from Brigman, and Brigman said he wanted to put the money for them on the *debt he and Woodfin owed the bank;* that he assisted Brigman to drive the stock (twenty-one head) to Asheville, and that while on their way Brigman remarked that he and Woodfin owed a large debt in bank, and had now a chance to make a large payment in stock. On
(337) reaching Asheville, Brigman, Woodfin, and a man he did not know, but who was called Dobson, had a conversation together, the purport of which he did not hear, and that afterwards he heard Brigman say, while on his way home, that he had got about $3,000 for his stock, but had taken back one mule.

We think this evidence does tend to show the alleged copartnership, and if credited by the jury, justly authorized their verdict.

2. While the trial was in progress the court permitted the plaintiff to amend the first article of his complaint by inserting the words "being jointly interested as partners in the business of trading." To this the defendant also excepted.

The judge has power to amend, even after judgment, any "pleading, process, or proceeding," by inserting other allegations material to the case, conferred by C. C. P., sec. 182. *Penny v. Smith,* 61 N. C., 35. Whether an amendment which rests in the discretion of the judge shall be allowed or refused, the exercise of his discretion cannot be reviewed in this Court. *Lippard v. Roseman,* 72 N. C., 427. This has been so often declared that a reference to authority is entirely needless. Had the defendant asked for a mistrial and continuance on the ground of surprise, and because he was unprepared to meet the changed aspect of the plaintiff's case resulting from the amendment, it would, we have no doubt, have been granted. This the defendant's counsel did not do, but preferred to go on with the trial. He has therefore no just cause for complaint.

3. It is next objected that the plaintiff, when asked to provide for the bank debt, did not promise to do so, so as to make a contract binding on both, without which it would be binding on neither, and if such promise has been made, an unreasonable time was suffered to elapse before the promise was fulfilled.

This objection in part rests upon a misconception of the law. (338) If the intestate and Woodfin requested the plaintiff to provide for and pay their bank debt, and promised to repay him, and the plaintiff did afterwards pay the debt, the obligation on their part would be complete; and this, whether the plaintiff had expressly contracted to take up the note or not. The transaction when complete would contain all the elements of a contract binding on them.

Nor was the delay so unreasonable as to exonerate the intestate and his associate partner from their obligation to repay to the plaintiff the money expended for their benefit and by their direction, even though a considerable period of time had elapsed before it was done. The acceptances and notes representing at different times the same indebtedness did not operate to discharge the debt. The liability to pay it remained in full force until it was extinguished by the moneys of the plaintiff, and it would be no less unconscientious than opposed to the sound rules of law to permit them to take advantage of the plaintiff's payment and refuse him the indemnity promised.

The only remaining objection we propose to notice relates to the form of the judgment, which in his Honor's opinion charges the defendant with assets.

If such should be its effect under the law as existing prior to the act of 16 April, 1869, and by which the administration of the intestate's estate is governed, it would be strictly correct, because the want of assets is a defense which should be set up in the answer, and it is not set up as required by the rules of pleading. If, however, the judgment is controlled by the provisions of that act, the question of assets would not be involved. Bat. Rev., ch. 45, sec. 95; *Dunn v. Barnes,* 73 N. C., 273; *Brandon v. Phelps,* 77 N. C., 44. But in either case the opinion of the judge is speculative merely, and the legal effect of the judgment can be determined only when the attempt is made to enforce it. In (339) form it is unexceptionable. We therefore declare there is no error, and affirm the judgment.

PER CURIAM. No error.

Cited: Dobson v. Chambers, 79 N. C., 143; *Brooks v. Brooks,* 90 N. C., 144; *Robeson v. Hodges,* 105 N. C., 50; *Moore v. Garner,* 109 N. C., 158.

JACOB KULL & SONS v. W. D. FARMER.

Promise to Pay Debt Discharged in Bankruptcy.

1. A parol promise to pay a debt discharged under the bankrupt act is a distinct cause of action, and the unpaid prior legal obligation, notwithstanding the discharge, is a sufficient consideration to support it.
2. Where the defendant promised to pay such debt more than three years prior to the commencement of the action, and again promised to pay it within three years, and suit was brought upon the latter promise: *Held,* that the plaintiff was entitled to recover.

APPEAL from *Eure, J.,* at Fall Term, 1877, of WILSON.

The defendant being indebted to the plaintiffs on a promissory note, was, in 1868 or 1869, under proceedings instituted in the proper district court of the United States, declared a bankrupt; and afterwards by a decree of the court discharged from his debts. After the adjudication in bankruptcy and before his discharge, the defendant promised to pay the debt, and after his discharge again promised to pay it. Neither of the promises was in writing. This action was commenced more (340) than three years after making the first, and within three years after making the last promise to pay the debt. Upon these facts admitted in the pleadings or found by the jury, judgment was rendered for the plaintiffs and the defendant appealed.

Busbee & Busbee for plaintiffs.
Kenan & Murray and George M. Smedes for defendant.

SMITH, C. J., after stating the facts as above: Although there are conflicting decisions elsewhere, it is a well settled doctrine in this State that the legal effect of a new promise relied on to remove the bar of the statute of limitations is to put that impediment out of the way and revive the original cause of action. Hence it is held that a new promise made after the commencement of suit is sufficient to repel the statute, and enables the plaintiff to recover. *Falls v. Sherrill,* 19 N. C., 371. It is otherwise where a promise is made to pay a debt discharged under the bankrupt act. In this the promise itself becomes or may become the *cause of action* and the unpaid prior legal obligation, notwithstanding the discharge, is a sufficient consideration to support it.

Where the cause of action has accrued since the adoption of the Code of Civil Procedure, and is barred by lapse of time, the new promise, to have any efficacy, must be in writing. C. C. P., sec. 51. If the plaintiffs had declared on the first promise and relied on the last, as evidence to remove the statutory bar, the provision of The Code would apply and they would fail. But the plaintiffs rely on the last promise as constituting the foundation of their right to recover, and this was within three years next before the issuing of the summons. We see no reason why this cannot be done, nor why a consideration sufficient to sustain the one is not also sufficient to sustain the other promise; nor can we understand how upon any legal principle a complete and full remedy existing independently can be lost or impaired by proof of an unfulfilled prior promise to pay the debt, which if declared on would be barred (341) by the lapse of time. We deem it only necessary to refer to two cases. *Hornthall v. McRae,* 67 N. C., 21; *Fraley v. Kelly, ibid.,* 78.

PER CURIAM. No error.

Cited: Menzel v. Hinton, 132 N. C., 662.

---

(342)

W. W. ROLLINS AND OTHERS v. R. M. HENRY AND OTHERS.

Execution Sale—Purchaser for Value—Evidence—Lost Execution—Recitals in Sheriff's Deed—Assignment of Error on Appeal—Probate and Registration of Deed—Purchase of Property Pending Litigation—Consent Decree—Practice—Answer.

1. Title derived by purchase at a sheriff's sale under a judgment not docketed in the county where the land lies avails nothing against a purchaser for value from the defendant in the execution.

2. The requirement that a judge shall sign all judgments rendered in his court is merely directory, and his omission to do so will not avoid the judgment as to strangers; although it might in connection with other evidence be a proof that the judgment was fraudulent, or had not in fact been rendered by him.

3. Only a defendant can avoid a judgment for irregularity, and as long as he is content to waive the irregularity, strangers cannot avail themselves of it collaterally. Therefore, where on the trial below a judgment, rendered in another case against one not a party to this action (relied on by the plaintiffs to prove title), appeared to have been rendered without any case having been constituted in court: it was *Held*, that the defendant in the action on trial could not take advantage of the irregularity.

4. The contents of a lost execution, like any other lost writing, may be proved by *parol*.

5. Where on the trial of an action in the court below, a party objecting to the admission of evidence assigns an insufficient reason for the objection, he cannot on appeal to this Court assign a different reason in support of such objection.

6. The return to an execution is ordinarily the best evidence of a levy and sale under it; but when the execution has not been returned to the clerk's office, and it, with any return on it, has been destroyed or lost, and it is proved otherwise than from the recital in a sheriff's deed that there was a judgment and execution, the recital in such deed is *prima facie* evidence of the levy and sale (they being official acts of the sheriff), even although the sale was not a recent one.

7. Unless the execution of a deed is proved in some manner authorized by statute, its registration will not make the deed evidence; its execution must be proved on the trial.

8. Proof of the handwriting of the grantor is not sufficient (nothing else appearing) to entitle a deed to registration.

9. Where one buys property pending an action of which he has notice, actual or presumed, in which the title to such property is in issue, from one of the parties to the action, he is bound by the judgment in the action just as the party from whom he bought would have been; and the rule also is (except as it may be qualified by C. C. P., sec. 90) that every person who buys property under such circumstances is conclusively presumed to have notice of the pending litigation.

10. A decree by consent is merely a conveyance between the parties, and whether or not it is fraudulent as to creditors must be determined by the consideration.

11. Such decree binds the parties and their privies in estate, but it is open to the latter to impeach it for fraud.

12. Where on the trial of an action to recover land the defendant relied upon a decree entered by consent in an action (instituted prior to the action on trial) between the defendant and the person under whom both sides claimed title, but entered after the purchase by plaintiffs at execution sale: *Held*, to be error in the court below to refuse to allow to such decree any force.

13. A purchaser at execution sale takes subject to all equities against the defendant in the execution, *whether he has notice of them or not.*

14. In an action to recover land, where the answer of the defendant denies the legal title of the plaintiff and sets up a legal title in himself, he is not at liberty to set up an equitable defense upon the trial.

ACTION to recover "The Sulphur Springs Lands," tried at Fall Term, 1877, of BUNCOMBE, before *Schenck, J.*

In the progress of the trial both parties admitted that the title to the land in controversy was originally in W. L. Henry, and that they both claimed under him.

The plaintiff introduced a record of Haywood Superior Court in the case of Samuel Gudger, executor of Robert Henry, against W. L. Henry, in which a judgment was rendered for the plaintiff, Gud- (344) ger, for $6,222, on 27 May, 1872. Upon this judgment (which was not docketed in Buncombe) an execution issued to the sheriff of Buncombe on 3 July, 1872, and was levied by him on the land in dispute, which was bought by the plaintiffs at the sale had on 28 September, 1872, and conveyed to them by the sheriff's deed on day of sale.

The plaintiffs then offered in evidence the judgment docket of the Superior Court of Buncombe, which showed a judgment in favor of B. H. Merrimon against W. L. Henry, for $360.75, dated on 29 November, 1869. The defendants objected, insisting that a judgment signed by the judge, and in the judgment roll, was the proper and only way to prove a judgment. Objection overruled, and the evidence admitted, and then the plaintiffs proposed to ask the clerk of the court whether he had issued an execution on said judgment, the entry of which is as follows:

B. H. MERRIMON	Minute Docket, Fall Term, 1869.
v.	
W. L. HENRY.	Pleas Withdrawn.

"D." Judgment according to a former judgment for the sum of $350.75, of which sum $220.57 is principal, and bears interest from 29 November, 1869, until paid, and for costs.

This was objected to by the defendants; objection overruled, and the clerk testified that he issued an execution on this judgment to the sheriff of Buncombe on 26 August, 1870. A *fi. fa.* on this judgment, dated 7 February, 1870, and levied 13 May, 1870, on said land was also in evidence; and the clerk testified that he issued a *ven. ex.* on 14 March, 1871, which after diligent search he could not find, and stated that it was never returned.

The plaintiffs also introduced a deed ("C") from the sheriff of Buncombe, dated on 1 July, 1871, conveying said land to the plain-
(345) tiffs. This deed recites executions issued from Buncombe Superior Court on judgments obtained at different times against W. L. Henry, and in favor of B. H. Merrimon, J. F. E. Hardy, cashier, and sundry other creditors, by virtue of which the land was exposed to sale.

The plaintiffs also introduced a deed from J. L. Henry and wife to Pinckney Rollins and L. M. Welch, dated 11 February, 1874, conveying their interest in said land. This deed was admitted to probate and ordered to be registered upon proof of the handwriting of said J. L. Henry, and the defendants objected to the evidence on the ground of irregularity in the probate. Objection overruled.

The facts constituting the defense set up by the defendants are embodied in the opinion of this Court, delivered by *Mr. Justice Rodman.* Verdict for plaintiffs. Judgment. Appeal by defendants.

J. H. Merrimon and Merrimon, Fuller & Ashe for plaintiffs.
J. G. Martin & Son and Battle & Mordecai for defendants.

RODMAN, J. Both parties claimed under W. L. Henry, and it is unnecessary, therefore, to go behind his title.

I. *The plaintiffs claimed title as follows:*

1. In the Superior Court of Haywood County on 27 May, 1872, Gudger recovered judgment against said W. L. Henry, upon which, on 3 July, 1872, execution issued to Buncombe County, which was levied on the land in controversy. The land was sold on 28 September, 1872, and purchased by W. W. Rollins and Pinckney Rollins, who are plaintiffs, G. M. Roberts, who was made plaintiff by amendment, and J. L. Henry. The sheriff conveyed to the purchasers on the same day.
(346) But this judgment was never docketed in Buncombe County. Possibly there may be cases in which a sheriff's sale under a judgment not docketed in the county where the land lies may avail something, but not in this case, where the defendants are purchasers for value from the defendant in the judgment.

2. Plaintiffs "offered in evidence the judgment docket of the Superior Court of Buncombe, which showed a judgment in favor of B. H. Merrimon against W. L. Henry, dated 29 November, 1869." Defendants objected to its admission because it was not signed by the judge, and was not a full copy of the judgment roll. It was, however, admitted, and we think it was competent.

The requirement that the judge shall sign all judgments is merely directory, and his omission to do so will not avoid the judgment as to

strangers, although it might, in connection with other evidence, be a proof that the judgment was fraudulent, or had not in fact been rendered by him.

As to the other ground: We consider the objection in substance to be that from the record presented in evidence (marked "D" in the record of this case) it does not appear that any case between the supposed plaintiff, Merrimon, and W. L. Henry was ever constituted in court by any of the prescribed methods, so as to give the court jurisdiction of any controversy between them; and that it does not appear that any summons was served, or that any case was agreed on and submitted, or that there was any confession of judgment. Supposing, as we must, that no more of the record exists than is offered in evidence, great weight would be due to this argument, if the question arose on a motion by the defendant to set aside the judgment for irregularity. But no one but the defendant in a judgment can avoid it for irregularity. As long as he is content to waive the irregularity, strangers cannot avail themselves of it collaterally. *Jacobs v. Burgwyn,* 63 N. C., 196. The record is (347) not a nullity. It is taken from the minute docket of Fall Term, 1869, and is apparently the judgment of the court, and by the words "pleas withdrawn" it appears to have been rendered by the consent of the defendant.

We pass on to the evidence as to further proceedings under this judgment.

The plaintiffs produced in evidence a *fi. fa.* issued to the sheriff of Buncombe on 7 February, 1870, and levied on the *locus in quo* on 30 May, 1870. They then offered to prove by the clerk of the court that on 14 March, 1871, he issued a *venditioni exponas* on this judgment, which was never returned and after diligent search could not be found in his office. This evidence was objected to, but admitted, as we think properly. It is too clear to need discussion that the contents of a lost execution, like any other lost writing, may be proved by *parol.* It may be that if the defendants had demanded it, the judge should and would have required the plaintiffs to show that the missing executions were not in the possession of the sheriff. But no objection was taken on that ground; and it has been held that if a party assigns an insufficient reason in the court below for his objection to evidence, he cannot assign a different one in this Court.

The plaintiffs then, for the purpose of showing a sale of the land in question, put in evidence a deed from Young, sheriff of Buncombe, in which he recites that by virtue of sundry executions against W. L. Henry, the parties to which are described by their names, and among them, an execution in favor of B. H. Merrimon, and also one in favor of J. F. E. Hardy, cashier (which may pass without notice at present), he had

levied on the lands in controversy as the property of W. L. Henry, and sold the same on 1 July, 1871, when James L. Henry, G. M. Roberts, P. Rollins and W. W. Rollins became the purchasers and he proceeded to convey the land, by a particular description, to them. The (348) deed is dated 1 July, 1871, and is marked "C" in the record of this case.

In delivering the opinion of the Court in *Edwards v. Tipton,* 77 N. C., 222, I said *arguendo* that I was not aware of any case in which it had been held that the recitals in a sheriff's deed were *prima facie* evidence of the judgment, levy, sale, etc., except under exceptional circumstances. The remark did not affect the case then under decision, and I made it on the authority of *Owen v. Barksdale,* 30 N. C., 81. I have since discovered that this case was apparently disapproved of on that point in *Hardin v. Cheek,* 48 N. C., 135. On this last case, however, it requires to be observed that the execution sale under which the defendant claimed was made in 1775, and as the trial took place in 1855—eighty years afterwards—the circumstances may be considered exceptional, and thus the two cases may be reconciled. On this question we have looked for authorities outside of this State, and we have found but few, and they are not clear.

In *Kelly v. Green,* 53 Pa., 302, it was held that after proof of judgment and execution, a recital in a sheriff's deed that he had given due notice of the time and place of sale, and that it was after an adjournment, is evidence of the truth of those recited facts, on the ground that the deed was an official act. In *Osborne v. Tunis,* 1 Dutch. (N. J.), 633-662, it is said: "The recital in a sheriff's deed of a compliance with the requirements of a statute has always been regarded as evidence of the fact." And to the same effect is *Hihn v. Peek,* 30 Cal., 280, as stated in Herman on Ex., sec. 290, p. 472. The case is not accessible. I find also cited *Sabittie v. Boggs,* 55 Ga., 572; *Taylor v. Elliott,* 52 Ind., 588, and *Anderson v. Clark,* 2 Swan (Tenn.), 156.

The rule which seems to be established, and which is supported by reason, appears to be this: The return to an execution is ordinarily the best evidence of a levy and sale under it. But when the execution (349) has not been returned to the clerk's office, and it, with any return on it, has been destroyed or lost, and it is proved otherwise than from the recital that there was a judgment and execution, the recital in a sheriff's deed is *prima facie* evidence of the levy and sale, they being official acts of the sheriff, even although the sale was not a recent one. This rule is intended to be applicable only to cases like the present, and does not touch cases like *Hardin v. Cheek,* where the deed was an ancient one, but there was no proof of a judgment and execution. With this view of the effect of the Merrimon judgment, and of what was done under

it, it is unnecessary to consider the plaintiff's title under the Hardy judgment and the proceedings thereon.

We concur with the court below, that the sheriff's sale and deed conveyed the *legal* title in the *locus in quo* to the purchasers at the sale.

3. In this consideration of the plaintiffs' title we have passed over the exception to the admission in evidence of the deed from J. L. Henry to W. W. Rollins. J. L. Henry was one of the purchasers at the execution sale on 1 July, 1871. The only effect of the rejection of his deed as evidence would have been either to limit the recovery of the other plaintiffs to three-fourths of the land, or to have required an amendment making J. L. Henry a party plaintiff. The validity of this conveyance did not touch the real question in controversy between the parties. The objection of the defendants might have been met by proof at the trial of the handwriting of J. L. Henry, and we do not know why the plaintiffs chose to risk their case on an exception which, whatever might be its force, we must presume could have been so easily avoided.

We are of opinion that this deed was improperly admitted. It does not come within any of the cases provided for by the statute (Bat. Rev., ch. 35, sec. 2, subsecs. 3 and 4); and it was held in *Carrier v. Hampton*, 33 N. C., 307, that although proof of a deed in any (350) way permitted by the common law will authorize its registration, yet unless the proof be such as the statute requires, the registration will not make the deed evidence, but its execution must be proved on the trial. If this deed had been rejected, the plaintiff would still have had a *prima facie* title to an undivided part of the land, and it is necessary to examine the defense set up.

II. *The defense attempted to be set up on the trial was:* That the defendant had a superior legal title by virtue of a decree of the Superior Court of Graham County, made at Spring Term, 1874. In order to form an opinion as to the effect of this decree, it is necessary to notice the material facts of the action in which it was made. On 6 September, 1850, an agreement was entered into between R. M. Henry (the present defendant) and W. L. Henry, to the effect that any property which might be acquired by either of them from either of their parents should be held for the common and equal benefit of both parties to the agreement. In February, 1864, R. M. Henry filed his bill in the court of equity for Buncombe County, alleging that the defendant had acquired from his father the land now in controversy with much other property, and demanding the specific performance of the agreement, and to that end an account of the property acquired, and the conveyance of a moiety thereof. The action pended until Spring Term, 1873, when an order was made that it be removed for trial to the Superior Court of Rutherford. After the making of that order, viz., on 11 March, 1873, the par-

ties agreed in writing to remove the action to the Superior Court of Graham County, and at Spring Term, 1874, of that court a decree was made, by consent, that the plaintiff recover the land now in controversy, and it was declared in the decree that it should have the effect to convey the legal estate in fee to the plaintiff, the present defendant.

(351) Upon the trial, evidence was given tending to prove that this decree was collusive and fraudulent. Supposing the decree to have been otherwise efficacious to pass the legal estate as against the plaintiffs, that objection to it was legitimate and raised a mixed question of fact and law, and if it were found that the decree was fraudulent, the judge would properly have held it void and put it out of view as affecting the title.

The evidence to prove the decree fraudulent consisted of certain declarations of W. L. Henry, the defendant in it. No doubt there are cases in which such extraneous evidence may suffice to prove a judgment fraudulent. But the true test in this case is to be found in the decree itself. A decree by consent is merely a conveyance between the parties, and whether it is fraudulent or not as to the creditors must be determined by the consideration, which in this case was the equity of R. M. Henry under the agreement. The judge did not take this view of the decree, but denied it all force, and held that it could not pass the legal estate as against the plaintiffs, *whose estate was acquired prior thereto.* Probably he thought that the doctrine of *lis pendens* was applicable to a case where only the legal title was in issue. That general doctrine is familiar and is firmly established. It may be stated, with sufficient accuracy for the present purpose, to be this: When a person buys property pending an action of which he has notice, actual or presumed, in which the title to it is in issue, from one of the parties to the action, he is bound by the judgment in the action, just as the party from whom he bought would have been. The rule is absolutely necessary to give effect to the judgments of courts, because if it were not so held, a party could always defeat the judgment by conveying in anticipation of it to some stranger, and the plaintiff would be compelled to commence a new action against him, and so on indefinitely. And the rule also is (except as it may be qualified by section 90, C. C. P.) that every person who buys property under such circumstances is conclusively pre-

(352) sumed to have notice of the pending litigation. The rule applies equally to actions at law and in equity. If a defendant in ejectment should sell his estate pending the action, the purchaser would be bound by the judgment, and would be ejected from possession as his vendor would have been.

We think the judge erred in refusing to allow any force to the decree of 1874. It was not apparently irregular. It was lawful for the par-

ties to the action to agree to substitute Graham for Rutherford as the county to which the action should be removed for trial. A decree by consent binds the parties, and their privies in estate, but it is open to these last to impeach it on the ground that it was fraudulent to their injury; and in the present case it would be fraudulent as to the plaintiffs, if it gave to the defendant R. M. Henry any greater estate in the property than he was equitably entitled to, and than would have been given him by the court on a hearing of the action. Subject to this liability to be impeached, and until impeached, the decree (under our act, Rev. Code, ch. 32, sec. 24, reënacted by chapter 17, Laws 1874-75) passed a legal title to the present defendant against all in privity with W. L. Henry, from the commencement of the action in which the decree was made. We need not consider the effect of section 90, C. C. P., requiring notice of *lis pendens* to be filed with the clerk of the Superior Court of the county in which the land lies, because the action was commenced in the county in which the land lies, and specially because the plaintiffs were purchasers at execution sale; and it is settled law in this State that such a purchaser takes subject to all equities against the defendant in the execution, *whether he has notice of them or not.*

As our opinion on this point entitles the defendant to a new trial, we might stop here. But there is another question upon which the judge passed that will probably arise upon a new trial, and on which we think it our duty to express an opinion, as it will aid the parties in reaching a just determination of the matters in issue between (353) them.

The defendant contended on the trial that even if the decree of Graham Superior Court was ineffective to convey to him a legal estate in the land paramount to that of the plaintiffs, yet that under it, or at least under the agreement between R. M. Henry and W. L. Henry of September, 1850, they had an equitable estate or right to the land, or to some part of it, which was a defense to the plaintiffs' demand. The judge, held, however, that inasmuch as by their answer the defendants had denied the legal title of the plaintiffs, and had claimed a legal title in themselves, and had not set up any equitable defense, they were not at liberty to do so on the trial, but must avail themselves of any equitable rights they might have in a separate action.

In this opinion we concur with the judge. It is by the pleadings that the parties make and define the issue upon which they put their rights, and it cannot be allowed to either, upon the trial, to change or add to the issues which have deliberately been joined.

It is manifest, however, that the defendants have some equitable rights, of the extent of which it is not proper for us now to speak. As there is to be a new trial, they should be allowed to amend their answer if they

choose to do so, by setting them up as a defense. If they elect not to do so, we are inclined to think that they will not thereafter be estopped from asserting them in a separate action. But if they elect to amend their answer in this respect, it will be for the judge to decide what the equity of the defendants is under the agreement of September, 1850; or, in other words, what should have been the decree in the equity suit between R. M. Henry and W. L. Henry, which was pending in Buncombe Superior Court, without any regard to the consent decree in Graham. This decree, if it gives to the plaintiff in it (R. M. Henry) what he was not equitably entitled to under the agreement, to
(354) the prejudice of these plaintiffs, was necessarily fraudulent as to them, and no proof *aliunde* is necessary. The judgment of the court can be so framed as to give to the defendants the benefit of any equities to which they may be found entitled, and thus end the protracted controversy between these parties.

PER CURIAM. *Venire de novo.*

Cited: Todd v. Outlaw, 79 N. C., 241; *Walton v. Walton,* 80 N. C., 30; *Bank v. Statesville,* 84 N. C., 176; *Matthews v. Joyce,* 85 N. C., 265; *Wynne v. Prairie,* 86 N. C., 77; *Lee v. Bishop,* 89 N. C., 260; *Keener v. Goodson, ib.,* 277; *Hinsdale v. Hawley,* 89 N. C., 89; *Miller v. Miller,* 89 N. C., 405; *Curlee v. Smith,* 91 N. C., 177; *Young v. Jackson,* 92 N. C., 147; *Dancy v. Duncan,* 96 N. C., 116; *Knott v. Taylor,* 99 N. C., 515; *Anderson v. Logan,* 99 N. C., 475; *Spencer v. Credle,* 102 N. C., 75; *Collingwood v. Brown,* 106 N. C., 365; *Cowen v. Withrow,* 111 N. C., 311; *s. c.,* 112 N. C., 737; *Bond v. Wool,* 113 N. C., 21; *Range Co. v. Carver,* 118 N. C., 338; *Person v. Roberts,* 159 N. C., 171; *Harris v. Bennett,* 160 N. C., 342.

Overruled: Black v. Justice, 86 N. C., 509; *Bird v. Gilliam,* 125 N. C., 79; *Wainwright v. Bobbitt,* 127 N. C., 280; *Morgan v. Bostic,* 132 N. C., 750; *Wilson v. Brown,* 134 N. C., 408; *Renn v. R. R.,* 170 N. C., 141; *Brown v. Harding, ib.,* 261; *Moody v. Wike, ib.,* 544.

HARPER WILLIAMS v. SALLIE R. WALLACE AND P. H. ALBERTSON.

Color of Title—Actual and Continuous Possession.

1. No length of constructive possession will ripen a defective title to land into a good one; the possession must be actual and continuous.

2. Where there is no actual occupation of land shown, the law carries the possession to the real title.

3. A possession of land under color of title must be taken by a man himself, his servants or tenants, and by him or them continued for seven years together. Therefore, where in an action to recover land it appeared that the plaintiff under color of title had made occasional entries upon the land at long intervals for the purpose at one time of cutting timber, at another of making bricks, etc.: *Held*, that the plaintiff was not entitled to recover.

ACTION for trespass, tried at Spring Term, 1877, of DUPLIN, before *Seymour, J.*

The plaintiff alleged that he was the owner in fee of certain lands lying near Sarecta on the North East River in Duplin County, and that the defendants had entered upon the same to the annoyance of the plaintiff's tenants, and were endeavoring to dispossess him (355) of the same. The defendants alleged that the title was in defendant Wallace, and not in plaintiff, and for a further defense say that said defendant has been in possession for more than three years prior to the commencement of this action, and deny the alleged trespass in cutting down and destroying a large number of valuable trees, etc. The facts set out by *Mr. Justice Bynum* in delivering the opinion are deemed sufficient to an understanding of the point decided. Upon an intimation of his Honor that the plaintiff had failed to show a good title to the land, he submitted to a nonsuit and appealed.

J. N. Stallings and Merrimon, Fuller & Ashe for plaintiff.
H. R. Kornegay for defendants.

BYNUM, J. This is a plain case for defendants. It is admitted that the title of the *locus in quo* was in the defendant Sallie Wallace in 1844. It is immaterial what has become of her title since, unless the plaintiff has connected himself with it. This he has not done, but, on the contrary, he claims under the deed of one Seth Davis, who purported to sell the land as administrator of one J. P. Davis by deed dated 28 September, 1857. This title was therefore a defective one, and could ripen into a good one by an adverse possession of seven years only.

But as the action was begun on 4 February, 1874, after eliminating the time during which the running of the statute of limitations was suspended, only six years and nine months had elapsed before the commencement of the action, so the title was not perfect in this way. But no length of constructive possession will ripen a defective title into a good one. To have this effect the possession must be actual and continuous.

This action, therefore, can only be maintained upon the possession of the plaintiff. If he has failed to show an actual occupa- (356)

tion by himself, the law adjudges the possession to be constructively with the title, that is, with the defendant Sallie Wallace and those deriving title under her.

When there is no actual occupation shown, the law carries the possession of the real title. So it is immaterial in this view whether the defendants had the actual possession or not.

The question then is, whether the plaintiff, having only a defective title, had been for seven years in the actual occupation of the premises at the commencement of the action. *Cohoon v. Simmons,* 29 N. C., 189; *McCormick v. Monroe,* 46 N. C., 13. About this there can be no doubt.

No witness proves that the plaintiff or those under whom he claims had been in the actual possession of the lands in dispute for a year, a month, or a week continuously, prior to the commencement of the action. From 1857, the date of the deed under which the plaintiff claims, to 1873, when the action was instituted, a period of sixteen years, only a few single acts of trespass were proved, such as cutting ton timber at one time, firewood at another, making rails at another, making bricks at still another, all occasional and at long intervals, unaccompanied by a continuous possession of public notoriety, such as the law requires to be given to the world that the plaintiff is not a mere trespasser, but claims title to the land against all mankind.

A possession under color of title must be taken by a man himself, his servants, or tenants, and by him or them continued for seven years together.

The acts constituting this possession should be such "as to admit of no other construction than this, that the possessor means to claim the land as his own. In order to make this notorious in the county, he must also continue in possession for seven years. Occasional entries upon the land will not serve, for they may either be not observed,
(357) or, if observed, may not be considered as the assertion of rights." *Grant v. Winborne,* 3 N. C., 56; *Loftin v. Cobb,* 46 N. C., 406; *Andrews v. Mulford,* 2 N. C., 311; *Bynum v. Carter,* 26 N. C., 310; *Bartlett v. Simmons,* 49 N. C., 295.

The plaintiff having wholly failed to establish such a possession as would entitle him to maintain the action, it is unnecessary to notice the title of the defendants.

PER CURIAM. Affirmed.

Cited: Kitchen v. Wilson, 80 N. C., 197; *Gudger v. Hensley,* 82 N. C., 483; *Scott v. Elkins,* 83 N. C., 427; *Simmons v. Ballard,* 102 N. C., 111; *Ruffin v. Overby,* 105 N. C., 86; *McLean v. Smith,* 106 N. C., 178; *Cox v. Ward,* 107 N. C., 512; *S. v. Boyce,* 109 N. C., 756; *Cooper v. Axley,* 114 N. C., 646; *McLean v. Smith, ib.,* 365, 366; *Hamilton v. Icard, ib.,* 536, 537; *Woodlief v. Wester,* 136 N. C., 166.

JAMES W. DAVIS AND OTHERS v. THOMAS McARTHUR.

Action to Recover Land—Adverse Possession—Presumption of Grant.

1. Where A. enters into possession of land, the property of B.'s wife, under a deed from B. alone, the possession of A. is in law the possession of the wife, and inures to her benefit.
2. From an adverse possession of land for thirty years the law presumes a grant from the State, and it is not necessary even that there should be a privity or connection among the successive tenants.
3. Where in an action to recover land the plaintiff showed a continuous adverse possession, under deeds defining the lands by metes and bounds, from 1815 to 1848, by those successively under whom he derived title, the last nine years of which the possession was held under a deed sufficient in form to pass the estate in fee, and the defendant showed a grant from the State in 1848: *Held*, that plaintiff was entitled to recover.

ACTION to recover the possession of land, tried at Fall Term, 1877, of RUTHERFORD, before *Kerr, J.*

This action was brought to recover a tract of land alleged to be in possession of the defendant and wrongfully withheld from the plaintiffs. The defendant denies the plaintiffs' allegations and sets (358) up title in himself. On the trial the following facts were in evidence: One R. M. Alexander, by deed dated 12 April, 1815, conveyed the land in dispute to Sally Crook, who afterwards intermarried with James Arthur and never had issue. In January, 1825, after the marriage, Arthur alone executed a deed to William Arthur, and therein undertook to convey the land to him. This was with the knowledge and consent of his wife, and William Arthur entered into possession and held the land. On 10 March, 1839, James Arthur and wife, by their deed properly executed, conveyed the land to John Baber, to whom William Arthur surrendered possession. These deeds were inartificially drawn, and none of them contained words of inheritance. On 10 May, 1839, John Baber, by deed in proper form to pass an estate in fee, conveyed to Toliver Davis, who died intestate, and the plaintiffs are his heirs at law. The defendant claims under a grant from the State which issued in 1848.

The defendant insisted that the possession of William Arthur for fourteen years was adverse to Sally Arthur, and broke her continuity of possession, and asked an instruction to this effect to the jury. The court refused so to charge, and told the jury that William Arthur having entered into possession of the land under the deed of James Arthur, who had no title in himself, the possession of William Arthur was in law the possession of Sally Arthur and inured to her benefit. The court fur-

ther instructed the jury, that if there had been a continuous possession of the land from 1815 to the year when the grant issued, including the fourteen years occupancy by William Arthur, and the jury should so find, the effect would be to vest title in the plaintiffs, and they would be entitled to recover. To this the defendant excepted. Verdict
(359) for plaintiffs. Judgment. Appeal by defendant.

W. J. Montgomery and W. H. Bailey for plaintiffs.
J. F. Hoke for defendant.

SMITH, C. J., after stating the case as above: We think the court was correct in both rulings. The possession of William Arthur, being under James Arthur, who acted for himself and wife, was but an extension of the possession of the rightful owner and for her benefit. And if this was not so, the result would not be changed. The case is simply this: There has been a continuous adverse possession of the land for the space of thirty-three years from 1815 to 1848, under deeds defining the same by metes and boundaries, by those successively under whom the plaintiffs derive title, during the last nine years of which the intestate, Toliver Davis, had possession under a deed in form sufficient to pass the estate in fee. These facts entitle the plaintiffs to recover.

It has been settled by repeated adjudications in this State that an adverse possession of lands for thirty years raises a presumption of a grant from the State, and it is not necessary even that there should be a privity or connection among the successive tenants. We will only refer to some of the cases in support of the doctrine. *Fitzrandolph v. Norman,* 4 N. C., 564; *Rogers v. Mabe,* 15 N. C., 180; *Wallace v. Maxwell,* 32 N. C., 110; *Reed v. Earnhart, ibid.,* 516. This presumption arises at common law and without the aid of the act of 1791, and it is the duty of the court to instruct the jury to act upon it as a rule of the law of evidence. *Simpson v. Hyatt,* 46 N. C., 517. The grant is inferred, not because of a belief that one did in fact issue, "but because there is no proof that it did not, and in the nature of things it would seem that *there can be no sufficient negative proof* of the kind supposed. *Bullard v. Barksdale,* 33 N. C., 461.
(360) Title being thus out of the State, it vested in Toliver Davis by virtue of his nine years possession under the deed made to him in 1839, which professes, and in form is sufficient, to pass the estate in fee by virtue of the act of limitations. Rev. Stat., ch. 65, sec. 1. *Taylor v. Gooch,* 48 N. C., 467.

We do not deem it necessary to consider and decide the question discussed at the bar, whether possession under a deed which conveys a life estate only can operate as color of title to vest a fee. We hold that the

long possession presumes a grant from the State to some one, and the possession of Toliver Davis under his deed vests title in him. The plaintiffs, his heirs at law, are therefore entitled to recover the land.

PER CURIAM. No error.

Cited: Hill v. Overton, 81 N. C., 395; *Freeman v. Sprague,* 82 N. C., 368; *Scott v. Elkins,* 83 N. C., 427; *Osborne v. Anderson,* 89 N. C., 262; *Cowles v. Hall,* 90 N. C., 334; *Phipps v. Pierce,* 94 N. C., 518; *Davidson v. Arledge,* 97 N. C., 184; *Pearson v. Simmons,* 98 N. C., 283; *Bryan v. Spivey,* 109 N. C., 66; *Hamilton v. Icard,* 114 N. C., 536; *Walden v. Ray,* 121 N. C., 238; *May v. Mfg. Co.,* 164 N. C., 265.

(361)

DANIEL WHISSENHUNT v. W. C. JONES AND OTHERS.

Action to Recover Land—Practice—Damages.

1. In an action to recover land, where both plaintiff and defendant claim under the same person, it is not competent for either to deny that such person had title.
2. Where in such action a defendant is allowed to come in and defend the action as landlord of the original defendants, he cannot object that no notice to quit was given to them.
3. In an action to recover land and damages for the time the plaintiff has been kept out of possession, damages are recoverable up to the time of the trial.

CIVIL ACTION to recover possession of land, removed from Caldwell and tried at November Special Term, 1877, of BURKE Superior Court, before *Schenck, J.*

Both parties claimed title under Henry Yount. The defendants Mack Chester and Wesley Watson were at first let into possession of the land in dispute as tenants of the plaintiff. The defendant Yount came in and defended the action as landlord. The defendant Jones was also allowed to be made a party defendant, and in his answer alleged that he was the owner of the land at the time when this action was instituted, and that the defendants Chester and Watson were his tenants, and that defendant Yount was never in possession of the same.

The plaintiff put in evidence a deed from Yount to John Hayes, dated 3 July, 1867, and one from Hayes to plaintiff, dated 2 October, 1869, conveying the land to plaintiff; also a deed from the sheriff to the defendant Jones, dated 12 March, 1870 (execution sale of Yount's

land), which said last deed was introduced to estop the defendants from denying Yount's title (all the deeds covering the land in con-
(362) troversy).

The plaintiff testified that after he paid for and took possession of the land, he employed defendants Chester and Watson to work a part thereof under a certain agreement; that about the time the crop was gathered the defendant Jones instituted a proceeding before a justice of the peace against him, and being ignorant of his rights and wishing to avoid a lawsuit, he paid rent on the part of the land he worked, to Jones, and directed the tenants to do the same. There was much other evidence on the part of plaintiff and defendants, but it is not material to the points decided here.

The defendants insisted: (1) That plaintiff could not recover, because no notice to leave had been served upon Chester and Watson, who were the original defendants; (2) That if plaintiff was entitled to damages in any event, they could only be given to the time when the suit was commenced, and not to the time of the trial.

Upon the issues submitted and under the instructions of his Honor, the jury found for the plaintiff. Judgment. Appeal by defendants.

A. C. Avery and R. F. Armfield for plaintiff.
G. N. Folk for defendants.

BYNUM, J. 1. Both the plaintiff and defendants claimed title under one Yount. In such case the rule is settled in this State that it is not competent for either claimant to deny that such person had the title; and though the defendants may show that they have in themselves a better title than the plaintiff, they cannot set up a title in a third person. *Love v. Gates,* 20 N. C., 363. The plaintiff here had the elder and superior title, and was therefore entitled to recover, unless he was prevented by the next exception.

2. But it was next objected that the plaintiff cannot recover because no notice to leave had been served upon the original defendants,
(363) Watson and Chester, who went into possession under the plaintiff, as his tenants from year to year.

The answer is, that the defendant Yount was allowed to come in and defend the action as landlord, and in such case it is settled that no notice before beginning the action is necessary. The application of Jones to defend in place of the tenants presupposes that the tenants are the tenants of Jones; so that although they entered at first as the tenants of Whissenhunt, they must have subsequently attorned or turned over to Jones, and thereby disclaimed and disavowed their tenancy to Whissenhunt, and thus put themselves in the wrong, which dispensed with notice. *Foust v. Trice,* 53 N. C., 490.

3. The last exception is that damages could only be given to the commencement of the action, and not to the time of trial. We think otherwise. The action is for the recovery of the possession of the land, and for damages for the time the defendants have wrongfully kept the plaintiff out of possession. Had this been the old action of ejectment, it has been decided that in that action, which was originally and properly an action for damages only, the actual damages could be assessed for the trespass. When afterwards the action of ejectment was divided into two actions, one to try the title and the other to recover the mesne profits after the possession had been recovered, it was still competent in the latter action to recover damages for the entire time the premises were occupied by the defendants. *Miller v. Melchor,* 35 N. C., 439.

The only difference between the action of trespass for the mesne profits under the old system and the present action under The Code is that in the former the writ did not lie until the possession had been actually recovered in the action of ejectment, while in the latter case the action is for both the possession and the damages for the use and (364) occupation at the same time. But they are both alike in this, that by either, damages are recovered for the time the plaintiff was kept out of possession by the defendants. The purpose of The Code in actions of this nature, as it is in all others, is that a complete determination shall be made of all matters in controversy growing out of the same subject of the action. Evidently this action would fall short of that consummation if the plaintiff could recover damages only up to the commencement of the action, and should be put to another action to recover the damages sustained subsequently, but before the time of the trial. That the damages up to the time of the trial are recoverable in this action is further apparent from the provisions of The Code, secs. 217, 261 (4), 262 (a) (e). Taylor's Landlord and Tenant, secs. 710-11-12. We are therefore of opinion that the mesne profits, by way of damages, were properly assessed up to the time of trial. *Jones v. Carter,* 73 N. C., 148. It appears in the case that the plaintiff, under some misapprehension of his rights, directed the rents for the year 1869 to be paid by his tenants to their codefendant, Jones. His Honor held that having thus assigned them, the plaintiff cannot recover the damages for the rents of that year. In that there is no error. It was also agreed by the parties that the defendant Jones, in case of recovery by the plaintiff, should retain the rents of 1877, paying therefor the assessed damage of $33.33 1-3, and judgment was rendered in the court below for the damages assessed for the time of the occupation of the defendants, except the first year as before explained. As the rents were paid by the tenants to their landlord, Jones, he, as between the defendants, is primarily liable for the amount of the judgment. The judgment of the Superior Court

is affirmed, with this modification, that no execution shall issue against his codefendants, if satisfaction of the execution against Jones (365) and his sureties can be had.

There is no error. Affirmed.

PER CURIAM.

Cited: *S. c.*, 80 N. C., 348; *Reed v. Exum,* 86 N. C., 727; *Burnett v. Nicholson,* 86 N. C., 105; *Grant v. Edwards,* 88 N. C., 250; *Pearson v. Carr,* 97 N. C., 196; *Morisey v. Swinson,* 104 N. C., 65; *Mobley v. Griffin, ib.,* 115; *Bonds v. Smith,* 106 N. C., 565; *Jones v. Coffey,* 109 N. C., 519; *Vaughan v. Parker,* 112 N. C., 101; *In re Hinson,* 156 N. C., 250; *Weston v. Lumber Co.,* 162 N. C., 168.

Distinguished: *Maddrey v. Long,* 86 N. C., 385.

JONAS STEELE v. McDANIEL WOOD AND AMBROSE JONES.

Action to Recover Land—Evidence—Declarations of Defendant.

Where on the trial of an action to recover land a question of disputed boundary arose, and the plaintiff introduced (without objection) certain declarations of the defendant made while he was engaged in chopping a certain line upon the land in dispute: *Held,* that certain prior declarations of the defendant made while he was chopping said line were admissible in evidence on his behalf, although not made in the presence of plaintiff.

ACTION to recover possession of land, tried at Fall Term, 1877, of SURRY, before *Cox, J.*

This was a case of disputed boundary. The defendants' deed called for a chestnut ridge where it comes to Mitchell's River, including the waters of Southard's Branch. There are two such ridges terminating on said river, about a half-mile apart, and either would include said branch; and the question submitted was, Which was the ridge called for by the deed? Several months before the action was brought the defendants chopped a line between said ridges from the river across the plat. One witness, introduced by plaintiff, testified without objection that the defendants, whilst chopping the line, told him that they were establishing the line, and that it was the true line. The defendants then offered a witness to prove that just prior to the above conversation, and whilst chopping the line, they told said witness that they were chopping a compromise line. This evidence, on objection by plaintiff, was excluded, and the defendants make it the only exception in the case. Verdict for (366) plaintiff. Judgment. Appeal by defendants.

Busbee & Busbee, J. W. Hinsdale, and G. B. Everitt for plaintiff.
Watson & Glenn for defendants.

FAIRCLOTH, J., after stating the case as above: In this we think his Honor erred. The defendants could not introduce their acts and declarations in their favor, nor could they have been used by either party to fix the true line or corner. They were not offered for such purpose, but for some other—probably to disparage the title of the plaintiff to the disputed premises, or to convince the jury that his (plaintiff's) claim was not made *bona fide,* and to satisfy them by indirection that the defendant's theory was the true one. The plaintiff introduced the acts and declarations of the defendants without objection. They were therefore heard by consent, and this being so, neither party after verdict could be heard to deny their competency. The act of chopping the line and a part of the explanation being before the jury, why should not the whole explanation be heard by them? The whole is necessary to give the true character and quality of the deed; and those declarations made at one period during the act are as important as any others to show its true intent and meaning. All of said declarations constitute one explanation, and it is a wholesome rule that where part of what a man says is used to charge him, he is entitled to the balance of what he said to discharge himself.

PER CURIAM. *Venire de novo.*

(367)

WILLIAM CLARKE v. D. M. WAGNER AND OTHERS.

Action to Recover Land—Practice—Damages—Costs.

In an action to recover land, where the verdict of the jury establishes the title of the plaintiff to the land in dispute, but does not find any wrongful act done by the defendant to the land to which title is thus established, the plaintiff is not entitled to recover damages or costs.

MOTION by plaintiff to modify the judgment in this action, heard at January Term, 1878, of the SUPREME COURT.

See same case reported in 74 N. C., 791, and 76 N. C., 463.

R. F. Armfield and M. L. McCorkle for plaintiff.
Scott & Caldwell for defendants.

SMITH, C. J. The plaintiff in his complaint claims title to and the right of possession of a tract of land granted in 1802 to one Samuel Houston, and alleges that the defendants wrongfully withhold possession.

In their answer the defendants deny that they are in possession of any land of the plaintiff, or that plaintiff has title to any land in their possession.

One of the boundaries of the Houston grant is recognized as one of the lines of the grant under which the defendants claim, and the matter in dispute was as to how this common line was to be run. The eastern terminus of the line was admitted to be at a post oak, and the controversy was whether it runs thence to the lower end of Island No. 2 in Catawba River, as was contended by the plaintiff, or to the lower end of Island No. 1, as insisted for defendants, passing by a white oak on the river bank. The only issue submitted to the jury was whether the lower extremity of the one or the other island was the point called for by the Houston grant, and they ascertained it to be at the lower (368) end of Island No. 1. To the other issues the jury were not required to respond. The result of this finding, with the proper construction of the descriptive words of the grant, was to leave a small triangular strip, with its apex at the post oak corner and its base of less than eight poles, at the river, and covering about four acres of land, within the Houston grant, and the residue of the disputed land would belong to the defendants. The case states that the defendants offered evidence tending to show that those under whom they claim had had continuous possession of this small triangle up to its northern boundary, inclusive of the land thus located within the plaintiff's boundaries, down to the date of the deed from Elizabeth Campbell to them in the year 1862; but it does not appear that *defendants have had* possession of or at any time trespassed upon the part awarded to the plaintiff by the verdict. Without objection from counsel or either party, the court having collated the evidence and agreement of counsel of both sides, remarked to the jury that if they located the second call of the Houston grant at the lower end of Island No. 1, it would be decisive of the case for defendants, and they need not proceed to the consideration of the other issues; and that, on the other hand, if they should find the second call at the lower end of Island No. 2, they would then pass upon the other issues.

After the verdict the plaintiff asked for judgment for so much of the disputed land as would thus fall within the boundaries of the Houston grant, and upon which it was not shown that the defendants had themselves trespassed. The court declined to do so, and adjudged that the defendants recover their costs. Upon the plaintiff's appeal to this Court, the judgment below was affirmed. *Clarke v. Wagner,* 74 N. C., 791.

The plaintiff now asks to have this judgment corrected, upon the ground that he has recovered a small part of the land in dispute, although

there has been no proof that the defendants have had possession (369) of that part, or withheld possession from the plaintiff, or committed any acts of trespass thereon. The verdict establishes his title, but to recover damages or costs he must show some wrongful act of defendants, done on the part to which he has shown title. The plaintiff alleges a *title* and *right of possession* of lands and the *wrongful withholding* of the same by the defendants. Both allegations must be sustained to enable him to recover. The defendants are not guilty of a tort in retaining possession of their own lands, although they erroneously claimed land belonging to the plaintiff. Indeed, the case seems to have been tried upon the understanding that the whole controversy turned upon the location of the second call of the Houston grant, and the jury were only required to ascertain its proper location. They have fixed it at the point contended for by the defendants, and have found no other facts upon which the plaintiff's present motion can be sustained. The motion is therefore denied.

PER CURIAM. Motion denied.

Cited: *Murray v. Spencer*, 92 N. C., 265.

(370)

ALFRED HOUSTON v. A. D. MCGOWEN AND OTHERS.

Sheriff's Deed—Description of Land.

On the trial of an issue as to the quantity of land conveyed in a sheriff's deed, there was conflicting evidence as to whether a 1,900-acre tract or 950 acres out of the tract had been sold. It appeared that the levy was "upon his (plaintiff's) interest in 950 acres located in Cypress Creek District," etc., and the return of sale was "the 950-acre tract levied on," etc.; the sheriff's deed was for 1,750 acres (leaving out 50 acres) and for 100 acres, and it was in evidence that the sheriff sold it as the plaintiff's interest in 950 acres, and proclaimed at the sale that he would sell all the interest which the plaintiff had in all his land in that district, and that plaintiff, who was present at the sale, knew of the sheriff's mistake, and did not correct it; the jury found that the defendant bought and the sheriff sold the whole interest of the plaintiff in the 1,900-acre tract: *Held*, that the verdict of the jury is conclusive and that the plaintiff cannot recover.

SPECIAL PROCEEDING begun in Probate Court and upon issues joined, tried at Spring Term, 1877, of DUPLIN, before *Seymour, J.*

The plaintiff alleged that he was tenant in common with the defendants in certain lands (1,900 acres) lying on Cypress Creek in Duplin

County, and from the rent of which the defendants had received a considerable sum of money, and asked that an account be taken of the amount of said rent, to the end that he may have judgment for the same.

In 1869 judgments were obtained against the plaintiff and his interest in said land was sold at execution sale and bought by the defendants, who claimed the same under a deed executed to them by the sheriff.

There was conflicting evidence as to whether the sheriff levied upon and sold the plaintiff's interest in 1,900 acres, or in 950 acres of land, and upon that issue the jury found that he sold his interest in 1,900 acres. The plaintiff moved for judgment according to his complaint, notwithstanding the verdict, which was refused. Judgment for
(371) defendants. Appeal by plaintiff. (See *Williams v. Houston,* 71 N. C., 163.)

H. R. Kornegay for plaintiff.
W. A. Allen & Son and J. N. Stallings for defendants.

READE, J. What did the sheriff sell? is the question. Did he sell the plaintiff's interest in the tract of land of 1,900 acres, or did he sell his interest in 950 acres of land? There ought not to have been any difficulty about it, for a sheriff ought always to ascertain what it is he is about to sell, and to put it to sale at the best advantage. And if he fails to do so he is liable to the person interested, in damages. And if the purchaser at such unfair sale is in complicity with the sheriff, the sale itself may be avoided.

Here there was conflicting evidence as to whether the sheriff sold a 1,900-acre tract or 950 acres out of a tract, and the levy does not help us out of the difficulty, for that is "upon his interest in 950 acres located in Cypress Creek District, adjoining the lands of," etc. The return of sale is a little more definite, being "the 950-acre tract of land levied on," etc., showing that it was not a *part* of a tract, but *a tract* of land. And the sheriff's deed is for 1,750 acres, leaving out 50 acres, and for 100 acres, all of which added make 1,900 acres. Surely the sheriff ought not to have discharged his duty so carelessly. His imperfect excuse is, as we suppose, that the plaintiff, who was then the defendant in the execution, was tenant in common with another in a 1,900-acre tract, his undivided interest being equal to 950 acres. And the sheriff confusedly called it his interest in 950 acres, which was half of the 1,900-acre tract; and the plaintiff in this case, who was defendant in that, is more in fault than the sheriff, for he was present at the sale, knew of the sheriff's
(372) mistake, and did not correct it, and called a witness's attention to it, probably for the purpose of making a fuss about it.

Although there was all this irregularity, yet the sheriff swears that he intended to sell, and proclaimed that he would sell, and did sell, all

the interest which the then defendant had in all his land in that district, and that his deed to these defendants by metes and bounds covers the 1,900 acres.

And to put the matter beyond dispute, so far as we can consider it, the jury found that these defendants bought, and the sheriff sold, the whole interest of this plaintiff in the 1,900 acres.

The sheriff having in his hands a *fi. fa.* and *ven. ex.* conferring upon him a power of sale, the question is not so much, What did he levy? as, What did he sell?

The jury find that he sold the debtor's interest in the whole 1,900 acres, and that is conclusive. There is no force in the other objections. There is no error. This will be certified. The defendants will recover costs in this Court.

PER CURIAM. Affirmed.

Cited: Miller v. Miller, 89 N. C., 406.

NANCY MILLER v. L. F. CHURCHILL AND W. H. MILLER, ADMINISTRATORS OF MARTHA T. MILLER.

Will; Construction of—Natural Heirs.

Where a testatrix bequeathed a certain sum each to her two sisters, M. and N., "and in the event of the death of either without *natural heirs*, the amount I have bequeathed shall go to the survivor": *Held*, that the words "natural heirs" mean children or issue; and upon the death of M. without issue, the bequest to her goes to N.

CONTROVERSY without action (C. C. P., sec. 315), involving the (373) construction of a will, submitted at Fall Term, 1877, of RUTHERFORD, to *Kerr, J.*

The only part of the will of the testatrix (Ann E. Birchett) material for the decision of the Court is as follows: "I bequeath to my sisters Nancy (plaintiff) and Martha (defendants' intestate) each $1,000 . . . and in the event of the death of either without leaving *natural heirs,* the amount I have bequeathed shall go to the survivor." Martha died without issue, and the question to be decided is, whether Nancy takes her legacy as her survivor.

His Honor being of opinion with the plaintiff, gave judgment in her favor for the amount of said legacy, to be paid by the defendants out of the assets in their hands belonging to the estate of their intestate. From which judgment the defendants appealed.

Shipp & Bailey for plaintiff.
W. J. Montgomery for defendants.

FAIRCLOTH, J., after stating the case as above: The word "heirs" is *nomen generalissimum,* and in a comprehensive sense may include all kinds of heirs; and so, *natural* heirs may do the same thing. The common understanding would say at once that natural heirs meant children, and looking at the situation and relation of the parties and all the circumstances, we think this was the meaning of the testatrix. She well understood that no one could have unnatural heirs; and as the word heirs alone might include both lineal and collateral, we think she intended something less than the whole class, and that she meant "children or issue" by the term *natural* heirs.

Again, if it be understood to mean heirs generally, then the proposition is fatal to itself, inasmuch as it was impossible for either to die without an heir. Upon the death of either one, the other was her
(374) collateral heir. *Reductio ad absurdum.* Our conclusion derives force from Battle's Revisal, ch. 42, secs. 3, 5.

PER CURIAM. Affirmed.

H. T. BASS, ADMINISTRATOR, v. JAMES C. BASS AND OTHERS.

Will, Construction of—Service of Process—Infant Defendant.

1. A testator by his will gave his entire estate to his wife, "to be disposed of by will or in any manner she may deem best"; the wife died, leaving the property undisposed of: *Held,* that under the will she acquired an absolute estate in the property, and at her death it descended to *her* heirs and distributees.

2. Infant defendants cannot "accept service" of process.

ACTION for the construction of a will, tried at Spring Term, 1877, of HALIFAX, before *Buxton, J.*

Turner Bass died in September, 1873, having previously made a will and appointed his widow, Rebecca W. Bass, executrix. The will was proved shortly after the testator's death, and she accepted the trust of the office.

The only disposition made of the testator's estate is contained in the first clause of the will, which is in these words: "I give, bequeath, and devise all of my estate of every kind and denomination, real, personal, and mixed, to my beloved wife, Rebecca W. Bass, to be disposed of by will or in any manner she may deem best."

Rebecca W. Bass died intestate in April, 1877, without making any disposition by will or otherwise of the property derived from her husband and then remaining in her hands. The plaintiff soon (375) afterwards took out letters of administration on her estate, and also letters of administration *de bonis non* with the will annexed on the estate of the testator. The plaintiff and the defendants are heirs and distributees of both the testator and the intestate, except the defendant Emeliza, who is the daughter of the testator by a former wife.

The action is brought by the plaintiff as administrator of both estates, to obtain a construction of the will in order that he may pay over the funds in his hands to the parties whom the court may declare entitled thereto. *Horah v. Horah,* 60 N. C., 107.

His Honor held that said Rebecca, the plaintiff's intestate, was at the time of her death seized and possessed of all the property of the testator, and that the same descended to her heirs and distributees. From which ruling the plaintiff administrator with the will annexed of Turner Bass, and the defendants W. H. Braswell and wife, Emeliza Braswell, appealed.

Mullen & Moore and Gilliam & Gatling for plaintiff.
No counsel for defendants.

SMITH, C. J., after stating the facts as above: The question as to the construction of the will is this, Does the wife take an *absolute estate,* or an *estate for her life only,* with power to dispose of the reversion, which by reason of her failure to exercise the power vests in the heirs and distributees of the testator?

If the latter be the true interpretation, the defendant Emeliza will share with the others, and if not, she will be excluded. Our opinion is that the widow takes an *absolute estate* in the property, and that the fund must be distributed among *her next of kin* under (376) the statute entitled thereto. There is no express limitation put upon the gift, and the superadded words which undertake to confer upon the wife a power of disposition, "by her last will and testament or in any manner she may deem best," cannot be allowed to have the effect of imposing such limitations. The words are unnecessary, because the right to dispose of an estate is incident to the estate itself; but they serve more clearly to indicate the testator's intent, that she shall have the property free from all restraint, to possess, use, and dispose of in any manner she may choose. Indeed, the right to use and dispose of a thing at will constitutes the essential element of property, and the measure of its value.

The law is well settled that if an estate be given to a person generally, with a power of disposal, it is in fee, unless the testator gives to the

first taker an estate for life only, and annexes thereto a power to dispose of the revision. 2 Jar. Wills, 171, n. 2; 4 Kent Com., 349; *Jackson v. Robins,* 16 Johns. (N. Y.), 588; *Rogers v. Hinton,* 63 N. C., 78; Sugden on Powers, 96.

We have expressed our opinion of the meaning and effect of the will in order to facilitate the settlement of the estates in the plaintiff's possession. But we can render no judgment until all the parties in interest are properly before the Court. The record shows that ten of the defendants are infants, without guardian, general or testamentary, upon whom no process has been served as required by C. C. P., sec. 59, and that all the defendants came into court and accepted service of process on the return of the summons. This the infant defendants could not legally do. No answers were put in to the complaint, and it does not appear that any guardian *ad litem* was appointed or undertook to represent and protect the interest of the infant defendants in the action.

(377) The cause must therefore be remanded in order that the infant defendants may be regularly and properly made parties, and their interest protected, and other proceedings had therein according to law.

PER CURIAM. Remanded.

Cited: Patrick v. Morehead, 85 N. C., 66; *Cates v. Pickett,* 97 N. C., 27; *Long v. Waldraven,* 113 N. C., 339; *Hughes v. Pritchard,* 153 N. C., 143; *Chewning v. Mason,* 158 N. C., 583; *Griffin v. Commander,* 163 N. C., 232; *Fellowes v. Durfey, ib.,* 311.

JAMES T. RITCH AND WIFE AND OTHERS v. J. R. MORRIS AND J. N. D. WILSON, EXECUTORS.

Will, Construction of—Bequest of Personal Property for Life, with Remainder Over.

1. Where personal property is bequeathed for life, with remainder over, and the bequest is not specific in terms and there is nothing in the will to show an intention or preference that the life tenant shall enjoy the specific property left, and in the form in which it is left, it must be converted into money as a fund to be held and applied to the benefit of all by paying the interest to the legatee for life and the principal to the remainderman.

2. A testator, by his will, bequeathed certain personal property, consisting of stock, crops, furniture, cash on hand, notes, etc., "to my daughters H. and F., to them and each of them during the term of their natural life,

and at the death of each to descend to the children of each, share and share alike; my said daughters during life to use the profits arising or accruing from their estate respectively and to inure to their sole, separate, and exclusive use and benefit, and at the death of each to descend as aforesaid": *Held*, that the executor should sell the personal property and pay over the interest on the fund so acquired (after paying debts) to the legatees annually and the principal to their children at the death of said legatees; and further, that the legatees were entitled to an account in order that the fund might be definitely ascertained.

CONSTRUCTION of a will, heard at Spring Term, 1875, of (378) CABARRUS, before *Schenck, J.*

Ezekiel Johnston, late of Cabarrus County, died in the month of July, 1874, leaving a last will and testament which was duly admitted to probate. The defendants were appointed executors, and after qualifying as such, they assumed the execution of the trust reposed by the will, the two items of which bearing upon the question decided by this Court are embodied in the opinion delivered by *Mr. Justice Bynum.* The plaintiffs contended that they were entitled to an account to ascertain the principal of the sum alleged to be due them, out of that portion of the testator's estate to which they were entitled as legatees for life, and to have the same paid over to them, with the accrued interest; but the defendants insisted that they were not entitled to the principal of the legacies, but only to the interest and profits arising therefrom, and that the language of the will by a proper construction applied to the personal and real estate alike, it being the intention of the testator that the plaintiffs should only have the use of the realty for life, and that only the interest accruing from the legacies should be paid to them during their lives.

His Honor held that it was the duty of the executors to sell the personal property and pay over the interest on the fund so acquired (after paying debts) to the legatees for life, annually, and the principal to the children at the death of said legatees; and as to the land devised, the court held that Mary Howie (now Ritch) and Martha Fuqua were entitled to a life estate, and to the possession and use thereof during their lives. From which ruling the plaintiffs appealed.

Wilson & Son, C. Dowd, and P. B. Means for plaintiffs.
W. J. Montgomery for defendants.

BYNUM, J. After a bequest of $500 to a grandson, to be paid (379) out of his personal estate, the testator proceeds thus:

"Item 9. I give and bequeath and direct to be divided as follows (subject to the payment of debts and incidental expenses of administration), to wit: To my granddaughter, William Eliza Johnston, one-half

of the undivided fourth part, and the residue I direct to be divided into three equal parts, one of which I bequeath to my daughter, Mary Howie, one of my daughters, Martha Fuqua, and the remaining third to the children of my deceased son, Zebulon Johnston.

"Item 10. The estate I have herein devised and bequeathed to my daughters, Mary Howie and Martha Fuqua, I give to them and each of them, during the term of their natural life, and at the death of each to descend to the children of each, share and share alike, my said daughters during life to use the profits arising or accruing from their estate respectively and to inure to their sole and separate and exclusive use and benefit, and at the death of each to descend as aforesaid."

The estate disposed of by the 9th item of the will consisted of horses, mules, cattle, farming tools, crops on hand and household furniture, of the value of $3,000, and of cash on hand, notes and bonds, of the value of $15,000.

The question presented is whether Mary Howie (now Ritch) and Martha Fuqua, the legatees for life, are entitled to the possession of the personal estate so limited to them for life and then to their children. As no appeal was taken from the decision of the court below in regard to the real estate, that part of the case is out of the way.

We think *Smith v. Barham,* 17 N. C., 420, is decisive of the question made here. There the testator by his will directed his debts to be paid, and the residue, with all the lands he should die possessed of, he (380) "lent to his wife, Mary, during life," repeating that by the term "residue" he meant that whatever should remain after the payment of debts should go to the wife for life, and that after her death the residue therein lent to his wife, the land excepted, should be divided among his children and grandchildren. The testator had twenty slaves which formed part of the residue, and also a large growing crop, provisions on hand, a valuable stock of horses and cattle, hogs, farming utensils, and household furniture. It was held that the residue given for life, with remainder over, must be sold by the executor, and the interest paid to the legatee for life, and the principal to those in remainder, as this was the only mode of giving both sets of legatees, the life tenants and the remaindermen, the enjoyment of their chattels which are perishable.

Smith v. Barham is approved in the subsequent case of *Jones v. Simmons,* 42 N. C., 178. There Martha Corlew by will gave to the defendant's testatrix, subject to the payment of debts, an estate for life in land, and "all her other property, be it of what kind or nature soever, not hereinafter disposed of, and at her death to be equally divided between the children of Celia Jones." The executor delivered the property, consisting of furniture, farming tools, stock, etc., to the life tenant, by

whom it was consumed, worn out, or destroyed. It was held that the remaindermen had a clear equity against the executor for compensation on account of this breach of trust, in not selling and paying over the interest to the tenant and holding the principal for the ulterior legatees.

This case was followed by *Tayloe v. Bond,* 45 N. C., 5. There the testator, Bond, gave to his sister, Mary Ashburn, an estate for life in the land upon which he lived, with "the use for her natural life of a sufficiency of household and kitchen furniture, of my stock of hogs, cattle, sheep, and horses, and my negroes, to support her. These articles are to be for her life only." The executors delivered the property to the life tenant, and the question was made whether by a (381) proper construction of the will they could do so. It was held that they could, and that after the allotment and delivery they had nothing more to do with it, but that the remaindermen, if it should thereafter become necessary, might take measures to prevent the removal or destruction of such of it as was not of a nature to be consumed by the use. But this decision was put expressly upon the distinction between this case and *Smith v. Barham* and *Jones v. Simmons, supra.* "In these last cases," say the Court, "a mixed and indiscriminate fund is given as a *residue* to one for life, with a limitation over; and it is settled to be the duty of the executors in such cases to sell the property and pay the interest to the first taker during life, keeping the principal for him to whom it is limited over, on the ground that this is the only mode in which the latter can be let into a fair participation of the testator's bounty. This case differs in many particulars and stands on its own particular circumstances: First, the fund, though mixed, is to be designated and allotted by the executors; thus a specific nature is impressed on it, so as to distinguish it from a mere residue. Second, there is no limitation over, but the interest in such of the property as remains on hand at the death of the first taker, not being consumed by the use, is left to fall into the residue. Third, the very object of the gift is that Mrs. Ashburn may be supported by the *use of the property.* This object would be defeated by a sale."

Succeeding *Tayloe v. Bond* came *Williams v. Cotten,* 56 N. C., 395, which is mainly relied on by the plaintiffs' counsel. There Margaret Cotten by her will gave to Frederick R. Cotten a negro slave named Prince; and to Eliza H. Thompson, a negro woman named Sabina, and all her children. She then bequeaths as follows:

5th. "All the residue of my estate I give in the following manner, viz.: To my son, Frederick R. Cotten, one share; to my granddaughter, Eliza H. Thompson, one share," etc.

6th. "Should Eliza H. Thompson die without issue, that is, a child or children, then and in that case I give all the property (382)

bequeathed to her above, of every description, to my son, Frederick R. Cotten, one share," etc.

The property consisted chiefly of money. It was held to be the duty of the executors to assent to the legacies and deliver the articles and money to the life tenants. But this was put upon two grounds clearly distinguishing this case from *Smith v. Barham* and *Jones v. Simmons*. First, because it appeared to be the intention of the testatrix that the legatees for life should have the use of certain articles of a specified nature—as, for instance, to some of the legatees for life negroes and other articles were given specifically; and to others pecuniary legacies only were given; but the limitations over were applied by the testatrix to each of the legatees, and to both species of legacies. It was therefore the duty of the executors to assent to the legacies of the slaves and other specified chattels; and it was held that the same rule must be applied to the money legacies. Second, because the property was given to the legatees absolutely, with an executory bequest over, upon a specified contingency, to wit, the failure of children, which made the reason for delivering it to the first taker much stronger, his interest being greater and that of the ulterior limitee more remote and uncertain. But in this case the rule is reiterated by the Court, "that if a mixed and indiscriminate fund of goods and other things is given as a *residue* to one for life and then over, it is the duty of the executor to sell and pay the interest to the first taker for life, keeping the principal for the remaindermen."

The counsel for the plaintiffs has referred us to two other and later cases in support of the claim of the life tenants, to wit, *Chambers v. Bumpass,* 72 N. C., 429, and *Hodge v. Hodge,* 72 N. C., 616. In the first of these cases John A. Bailey, after directing his debts and
(383) funeral expenses to be paid, proceeds in his will as follows: "I leave to Elizabeth T. Chambers, my dear and near friend, all the residue of my estate, both real and personal, during her natural life of single state, and at the termination of either, I then desire all my property to be equally divided between, etc., share and share alike."

It was held that the legatee for life was entitled to the possession of the property; but the decision is put upon the ground that it was the intention of the testator that the first taker should enjoy the use of his house, furniture, farming utensils, specifically, and not that she should have the interest on what they would sell for, and upon the further ground that the life tenant was not a residuary legatee, but a *universal* legatee, which distinguished this case from *Smith v. Barham* and that class of decisions.

In the last case cited, *Hodge v. Hodge,* 72 N. C., 616, William T. Hodge by will gave $1,250 to the use and benefit of Francis Hodge for life, then to the use and benefit of Henderson Hodge for life, and then

to be divided between the children of Henderson Hodge. It was held that the executor did not commit a *devistavit* by paying the legacy to the legatee for life. But this and the similar case of *Camp v. Smith,* 68 N. C., 537, decided the same way, were not cases of the bequest of a *residuary* estate at all or of a mixed and indiscriminate fund of goods and other things, but of the bequest of specific sums of money, where the intent evidently was that the life tenant should have the use of the specified sums, and where the remaindermen could, upon a proper case, restrain the first taker from consuming or destroying the principal. There being no bequest of a general residue for life, these latter cases have no application, and *Smith v. Barham* stands unopposed by any of the cases we have reviewed; and the rule of construction there announced must be received as the settled doctrine in this State. But our case is much stronger against the claim of the legatees for life. The (384) residue is not "lent to his wife, Mary, during life," as in *Smith v. Barham,* nor is the "use of" the property given to the legatee for life, as in *Tayloe v. Bond;* but the bequest here is "to my said daughters during life, to use the *profits* arising or accruing therefrom," making an evident distinction, if a distinction was necessary to show his intent, between the use of the *thing* itself and the use of the *profits* arising from it. So that, apart from the rule of construction which obtains in the absence of a contrary intent appearing, the intention of the testator is manifest, that the life tenants are not to have the property itself, but only the interest or profits of it, during life, and the remaindermen are to have the principal.

The purpose of the testator here to benefit the remaindermen would be in a great measure defeated if the legatees for life were entitled to the possession of the property. A large portion of it is perishable. A gift of things *quoe ipso usu consumuntur,* if construed as a specific legacy carrying the possession to the life tenant, would amount in fact to an absolute gift, for so much thereof as may be consumed in the using is gone forever without compensation to the remaindermen. To prevent this injustice, and to carry into effect the will of the testator, it has become the general rule of the English courts of equity, and the same rule prevails in this State, that where personal property is bequeathed for life, with remainder over, and the bequest is not specific in terms, and there is nothing in the will to show an intention or preference that the life tenant shall enjoy the specific property left, and in the form in which it is left, it must be converted into money as a fund to be held and applied for the benefit of all by paying the interest to the legatee for life and the principal to the remainderman. 1 Williams Exrs., 1259; 2 Williams Exrs., 1058; *Howe v. Lord Dartmouth,* 7 Ves., 137; *Morgan v. Morgan,* 14 Beav., 72; *Randall v. Russell,* 3 Meriv., (385)

194; Redf. on Wills, Part II, ch. 13, sec. 49. The judgment of the court below will be affirmed as far as it goes; but it does not extend far enough. The plaintiffs are entitled to an account of the residue of the estate so bequeathed, in order that the amount of the fund, the interest of which they are entitled to for life, may be definitely ascertained. His Honor held that the plaintiffs were entitled to the possession and profits of the real estate; but we are not prepared to say with him, that the plaintiffs are entitled only to a life estate instead of a fee simple in the lands. But that question does not now arise and is not decided by us. With the modifications specified, the judgment is affirmed and the case remanded to be further proceeded in in accordance with this opinion. Costs to be paid out of the principal of the fund.

PER CURIAM. Modified and affirmed.

Cited: *Peacock v. Harris,* 85 N. C., 149; *Britt v. Smith,* 86 N. C., 307; *In re Knowles,* 148 N. C., 466; *Haywood v. Trust Co.,* 149 N. C., 217; *Haywood v. Wright,* 152 N. C., 432; *Simmons v. Fleming,* 157 N. C., 392.

(386)

THOMAS P. DEVEREUX, TRUSTEE, v. JOHN DEVEREUX, EXECUTOR, AND OTHERS.

Will—Construction of—Charge Upon Real Estate.

1. A testatrix by her will bequeathed to her niece R. for her life the annual interest upon $4,000, and gave to D. one acre of land and certain small articles of personal property, and then gave the whole of her estate, "subject to the devises and bequests herein otherwise made," to her brother J. in fee in case he should be solvent at the time of her death, and if not, then to him in trust, etc., stating that "this provision includes the whole of my estate of every character, both real, personal, and mixed." Afterwards the testatrix made a codicil to the will, by which she gave the $4,000 to R. absolutely, and also gave certain other pecuniary legacies to her three sisters. Thereafter she made another codicil, "not wishing my real estate to be in any manner liable for the debts of my brother J., etc., I devise to my nephew T. all my land and other real estate, in trust for his mother during the life of J., and then to him (T.) and his heirs male in fee simple," etc. The personal estate of the testatrix, although at her death nominally ample to pay off the pecuniary legacies mentioned in the first codicil, proved to be insufficient for that purpose: *Held,* that the pecuniary legacies mentioned in the first codicil are a charge upon the real estate devised to T.

2. The legal effect of the words in the will, "subject to the devises and bequests herein otherwise made," is the same as if those devises and bequests had been directed to be taken out of the estate and the residue given to J.

3. The testatrix, by enlarging her bounty to R. in the first codicil, did not intend to withdraw or impair the security provided for its payment; and the additional legacies are within the words of the will and protected equally with the annuity to R. and the legacy afterwards substituted for it. And the second codicil was not made to disturb the relations previously existing between the different objects of the testatrix's bounty, or the value of their respective interests under the will.

ACTION for the construction of a will, tried at June Special Term, 1877, of WAKE, before *Buxton, J.*

Catherine A. Edmundston died January, 1875, leaving a will in which she disposed of her estate, real and personal, as follows: (387)

In the second clause of her will she bequeathed to her niece, Rachel Jones, during her life, "the annual interest on $4,000, to be paid her annually by my (her) trustee and executor hereinafter named."

In the next clause she devised to one Richardson and his wife, Dolly, persons of color, one acre of land to be taken from the tract whereon she then resided, under certain limitations, and bequeathed to them also some small articles of personal property.

The fourth clause of the will is in these words: "I give, devise, and bequeath the whole of my estate, subject to the devises and bequests herein otherwise made, inclusive of such rights as I have under the will of my grandfather, the late Nicholas Bayard, of the city of New York, and $5,000 insurance money on my life to my brother, Major John Devereux, of Raleigh, and his heirs, executors, and administrators, absolutely and in fee simple, if he shall not be insolvent at the time of my death; but if misfortune shall befall him, so that he shall have become insolvent at that time, then to the said John Devereux, to be used by him according to his best judgment and discretion for the benefit of his wife and children, and their heirs, executors and administrators, and the same shall not in any event be or become liable for any debt of the said John Devereux. This provision includes the whole of my estate of every character, both real and personal and mixed."

In the last clause the testatrix directs her executor to carry out some dispositions of personal property made in a memorandum left among her papers. The will bears date 11 October, 1874. On 4 December following, she made a first codicil to her will in these words:

1. "I give the $4,000 mentioned in my will to Rachel Jones (388) absolutely, and revoke the clause giving her the annuity therein specified.

2. "I give to my sister, Francis J. D. Miller, the sum of $1,000; to my sister, Mrs. E. P. Jones, the sum of $1,000; and to my sister, Mrs. Nora Cannon, $1,000."

On 17 December of same year she executed a second codicil as follows:

"I make the following addition to my will as a second codicil thereto: Not wishing my real estate to be in any manner liable for the debts of my brother, John Devereux, and to avoid the possibility of such an event, I devise to my nephew, Thomas P. Devereux, all my lands and other real estate in trust for his mother during the life of his father, and then to remain to him and his heirs male in fee simple; but if he shall die without having any issue of his body, then I devise said lands and other real estate to my nephew, John Devereux, and his heirs."

At the time of the death of the testatrix, it appears she was possessed of a personal estate, including the sum insured on her life, nominally ample to pay off the pecuniary legacies mentioned in the first codicil. But by reason of the inability of the executor to collect more than one-half of the insurance money, and the depreciation in value of other funds which came to his hands, the personal estate proves insufficient to pay the $7,000 given in the codicil to the niece and sisters, and leaves a large sum due to them which they claim to be charged upon the land, and if necessary to be raised by a sale of it.

His Honor affirmed the ruling of the referee to whom the case had been referred, and gave judgment in accordance with his report, to wit: that the pecuniary legacies were not a charge upon the real estate devised to the plaintiff. From this judgment the defendants appealed.

(389) *J. W. Hinsdale and R. C. Badger for plaintiff.*
D. M. Carter for defendants.

SMITH, C. J., after stating the facts as above: It thus becomes our duty to put a proper construction upon the words used in the will, and to ascertain and declare their true meaning and effect. The testatrix gives her entire estate, "real, personal, and mixed," without discriminating as to its different kinds, to her brother, John Devereux, for his own use, unless he should be insolvent, and in such event to be held in trust "for the benefit of his wife and children," and appropriates no special fund to the payment of the legacy to her niece, Rachel Jones. Instead of this, she charges the estate devised and bequeathed to John Devereux with the payment of the legacy, by declaring it to be "subject to the devises and bequests herein otherwise made." The legal effect of these provisions is the same as if those other devises and bequests had been directed to be taken out of the estate and the residue given to John Devereux.

In support of this construction, it is only necessary to refer to some adjudicated cases in our own reports. A legacy given "to be paid out of the testator's estate" is by those words charged upon the land which passes by the will. *Bray v. Lamb,* 17 N. C., 372; *Biddle v. Carraway,* 59 N. C., 95.

So a devise of land to one, he paying to each of two persons a certain sum of money as they respectively arrive at 21 years of age, is charged with the pecuniary legacies. *Aston v. Galloway,* 38 N. C., 126.

2. Admitting this to be the legal operation of the will as first made, our next inquiry is as to the effect of the codicils upon their testamentary dispositions.

The first codicil substitutes, in place of the annuity before given, a bequest of the principal sum, the interest of which was the measure of value of the annuity, and gives also to each one of the three sisters of the testatrix a legacy of $1,000. It is evident she did not in- (390) tend by thus enlarging her bounty to this legatee to withdraw or impair the security already provided for its payment, or in any manner injurious to her to change its relation towards the general estate. We are not without authority to sustain this conclusion.

In the case already cited (*Biddle v. Carraway*) the testator had in his original will charged his estate with the payment of a legacy of $1,500 to his wife, and by his codicil reduced the sum to $750. It was claimed that the codicil revoked the force of the expression contained in the will. The Court declared that no such result followed, and that the testator's intention manifestly was only to lessen the *amount of the legacy,* and quotes with approbation the following language, in regard to the effect of a codicil, from Jarman on Wills: "It is an established rule not to disturb the dispositions of the will further than is absolutely necessary for the purpose of giving effect to the codicil."

If a codicil diminishing the amount or value of a legacy merely is not allowed to annul or impair the security by which it is protected, still less can a codicil, increasing the legacy and indicating a more liberal disposition towards the legatee, have such effect.

3. We think the additional legacies to the sisters are also a charge upon the estate, and for these reasons:

(1) There is no fund out of which they can be paid except that devised to John Devereux, and unless it is charged, those legacies are negative.

(2) They are placed upon the same footing with the legacy to the niece, and it must be assumed are to be paid in the same way.

Associating the original will and codicil together and considering them as a single script, the additional legacies are within the words of the will and protected equally with the annuity and the legacy afterwards substituted for it.

It was argued before us with great earnestness that the second (391) codicil, in separating the personal from the real estate and changing the disposition of the latter, indicates the purpose of the testatrix to release the land from the burden of the legacies and charge the per-

sonal estate only with their payment. This intent, it is said, appears from the fact that the testatrix supposed her personal estate amply sufficient for that end. In this we do not concur. It is obvious that the last codicil was not made to disturb the relations previously existing between the different objects of the testatrix's bounty, or the value of their respective interests under the will. Its purpose solely is to provide new channels through which the devised lands shall pass, so as to prevent them from being disposed of or used for the payment of the debts of John Devereux, and to secure the full benefits of the devise to his wife and children. This is the only change the codicil undertakes to make, leaving in force all her other testamentary provisions.

It may be true—perhaps it is true—that the testatrix thought her personal property was ample to meet the requirements of the pecuniary legacies; but this error of hers cannot affect the legal import and effect of the words she employs to convey her interest. She has in clear and unambiguous terms subjected her whole estate to the legacies, and we cannot exempt any part of it from an obligation she sees proper to impose. Our office is to arrive at the meaning of the testatrix by putting a fair and just interpretation upon her words, and to declare the legal construction and effect of her will as she has made it.

It may be suggested, however, as difficult to assign a satisfactory reason for charging the entire estate with the payment of an inconsiderable annuity, and exonerating a large part of it from the payment of the legacies, greatly increased in amount as given in the codicil, upon
(392) the supposition that the testatrix did so under the belief that her personal estate was ample to meet the demands of all.

We therefore declare that the land is chargeable with the payment of so much of the legacies as shall be due after applying the personal estate thereto.

There is error, and the judgment below is reversed. Judgment will be rendered here in conformity to this opinion.

PER CURIAM. Reversed.

Reheard and modified: 81 N. C., 12.
Cited: Worth v. Worth, 95 N. C., 243.

SOPHIA ELWOOD AND OTHERS v. R. A. PLUMMER AND OTHERS.

Will, Construction of—Vested Remainder.

Where land was devised to O. in trust for two of the testatrix's daughters during their natural life, to be equally divided, and after the death of either, in trust in part for her three grandchildren until the death of the other daughter, "at which time" said land is to be "equally divided" between the said three grandchildren, of whom the defendant P. was one: *Held*, that the interest of P. in the land was a vested remainder and liable to sale under execution during the term of the life tenants.

ACTION to recover possession of land, tried at Fall Term, 1877, of MECKLENBURG, before *Kerr, J.*

A. C. Miller died intestate in Mecklenburg County, and the plaintiffs, Sophia Ellwood, M. J. Orr (wife of J. L. Orr), and T. J. Wilson, were his only heirs at law. The land described in the complaint was in the possession of the defendants, who claimed the same under the will of Susannah Alexander, only the fifth item of which (393) accompanies the case, and is: "I give, etc., to Silas Orr my plantation, to have and to hold in trust for the sole use of my two daughters during their natural lifetime . . . said plantation to be equally divided as near as can be by three persons chosen for that purpose . . . each of my said daughters to hold and have the use of the part they now live on. And it is further my will that after the death of either of my daughters . . . that the part of the place occupied by them be rented out by said Silas Orr, and the proceeds equally divided between my three grandchildren, R. A. Plummer (and the other defendants), until the death of the other daughter, at which time it is my will that my plantation . . . be equally divided into three lots between my three grandchildren . . ."

The plaintiffs claimed under a deed from the sheriff, executed on 25 July, 1869, to their ancestor, A. C. Miller, who was the purchaser at an execution sale. This deed conveyed the interest of defendant R. A. Plummer (the defendant in the execution) in said land to said purchaser.

It was agreed that if the court should be of opinion that the interest of said defendant in the land devised by said will to the daughters for life was liable to be sold under execution against the defendant during the life of said daughters, then there shall be judgment for plaintiffs; otherwise, judgment for defendants. His Honor adjudged that plaintiffs do recover, and the defendants appealed.

A. Burwell and W. H. Bailey for plaintiffs.
Jones & Johnston for defendants.

FAIRCLOTH, J. The only question presented by the record is whether the estate of R. A. Plummer was a vested or contingent interest at the time of the sheriff's sale, during the term of the life tenant, and
(394) that depends on the question whether his estate vested at the death of the testatrix or at the death of the surviving life tenant, who is now dead. This seems to be a plain question both from the authorities and the language of the testatrix.

A copy of the entire will is not before us, but only extracts from which alone we are to gather the intention. If the intention was uncertain and doubtful, the Court would incline to a vested estate, because that construction tends to certainty and settles the right of property. The whole tract of land is devised to one Orr in trust for two of the testatrix's daughters during their natural lifetime, to be equally divided, and after the death of either, in trust in part for her three grandchildren, until the death of the other daughter, "at which time" said plantation is to be "equally divided" between said three grandchildren, of whom R. A. Plummer is one. Here both the object of the gift and the *event* of its full enjoyment are *certain*, which makes a vested remainder unless a different intention can be discovered in the will. It is plain also that equality was the desire of the testatrix, but a different conclusion would lead to inequality in the event of the death of one of the grandchildren leaving children before the death of the tenant for life.

There is a class of cases, in which the gift is postponed to some future time, in which usually some express reason is given, or is easily gathered from the context of the will, for the postponement. This class is usually recognized when there is nothing else to control by the use of the words give or devise to a man "at," "when," or "if," etc., meaning at the death of the particular tenant, or when the devisee shall attain a certain age, or if some other event shall take place. These expressions are as applicable to the substance of the gift as they are to the time of its enjoyment, and the legacy would lapse if the legatee should die before the time indicated by these expressions, and this is the general rule.
(395) There is another class distinguishable from the above, such as a gift to one, payable at a particular time, or to be paid when a particular thing shall happen. In these the time does not refer to the substance of the gift, but only to the time of its complete enjoyment, and no lapse can occur in the meantime. And it has been held that the expression, "equally to be divided," means the same as payable or to be paid. *Guyther v. Taylor,* 38 N. C., 323; *Giles v. Franks,* 17 N. C., 521.

It will be seen that the expressions in the present case are substantially identical with those in the latter class of cases. No reason whatever appears why the gift should not take effect until the death of the surviving life tenant, but a good reason does appear why the division merely

was postponed until that time, which was that the purposes of the trust might be performed by the trustee, at which time his duties ceased, and the grandchildren were entitled to a division and possession of their estate.

This being so, the plaintiffs are entitled to recover. *Sutton v. West,* 77 N. C., 429.

PER CURIAM. Affirmed.

Cited: Starnes v. Hill, 112 N. C., 11.

---

(396)

W. C. JONES, WIFE, AND OTHERS v. H. W. ROBINSON AND OTHERS, EXECUTORS OF DAVID SETTLEMOIR.

Will, Construction of—Conflicting Description of Land.

1. A testator by his will devised that "the plantation that my son G. now lives on, lying in Burke County, 350 acres, to be sold . . . and the balance of the said land adjoining G.'s plantation where he now lives in Burke County to be equally divided with my three sons, J., H., and G."; the testator had three adjoining tracts of land in Burke County, containing respectively 400, 70, and 200 acres, the first two of which had been cultivated by G. for many years: *Held*, that under the will the entire plantation, containing the first two tracts (470 acres), should be sold; the words "350 acres" being only an accumulative description of the property, and not of the amount of land intended to be sold.

2. It is a well settled rule of construction that where there is in the first place an unambiguous and certain description of the thing, and afterwards another description which fails in certainty, the latter must be rejected.

ACTION for the construction of a will, heard at Fall Term, 1877, of CALDWELL, before *Cloud, J.*

David Settlemoir died in April, 1840, leaving a last will and testament, as follows: . . . "I will my plantation that I now live on with all the adjoining lands to my son George S. Settlemoir after his mother's death the plantation that my son George now lives on lying in Burke County 350 acres to be sold after he gets possession of the plantation I now live on and the money equally divided between my two daughters Sarah Mull and Agnes Settlemoir, and the balance of the said land joining George's plantation where he now lives in Burke County to be equally divided with my three sons, Jacob, Henry, and George."

It was in evidence that the testator had three tracts of land in

(397) Burke, one of 400 acres on which George lived, one of 70 acres, and another of 200 acres (all joining), as evidenced by the deeds for the same; but all the tracts contained a greater number of acres than were called for in the deeds. The two first tracts had been cultivated by the son, George, over ten years previous to his father's death, and after the death of the testator's widow, the defendant executors ran off 350 acres of the two first tracts, embracing all the cultivated land in each, so as to sell to the best advantage, and sold the same in 1862, and paid the proceeds thereof to Sarah Mull and the assignee of Agnes Settlemoir.

The question submitted: "Was it the intention of the testator to devise, under the above clause of his will, that the executors should sell 350 acres out of the 400-acre and 70-acre tracts, or to sell all the lands contained in these tracts and divide the proceeds of sale between said Sarah and Agnes?"

His Honor held that it was the duty of the executors to sell only 350 acres of the tracts mentioned, and gave judgment accordingly, from which the plaintiffs appealed.

R. M. Armfield and G. N. Folk for plaintiffs.
W. H. Bailey and M. L. McCorkle for defendants.

(398) BYNUM, J. A construction is asked of the following clause of the will, viz.: "The plantation that my son George S. Settlemoir now lives on lying in Burke County 350 acres to be sold after he gets possession of the plantation that I now live on," etc. The ambiguity of meaning arises out of the total lack of punctuation in the sentence. A careful consideration of this clause, and of the whole will, does not fully satisfy us of the intention of the testator. Did he mean that only 350 acres, *out* of the plantation, should be sold, or did he mean that the plantation, estimated to contain 350 acres, should be sold? Both parties agree that the whole plantation, having been worked for a number of years as one farm, consisted of two adjoining tracts, one of 400 acres and the other 70 acres.

After much thought, we have concluded that the meaning of the testator was, that the entire plantation should be sold, and that the words "350 acres" are only an accumulative description of the property, and not of the amount of land intended to be sold; as much as to say, "I will that my plantation in Burke County, that is, 350 acres, be sold." Considering the designation of the number of acres as only an alternative description of the plantation, the rule of construction is well settled, that where there is in the first place an unambiguous and certain description of the thing, and afterwards another description which fails in certainty,

the latter shall be rejected. The authorities cited by the plaintiffs' counsel, as well as good sense, establish this proposition. That the testator meant that the whole plantation should be sold we think sufficiently appears from the following reasons:

1. The case agreed admits that the two tracts, one of 400 acres and the other of 70 acres, in all 470 acres, composed the "plantation" upon which the son George resided. The testator proceeds in the (399) same sentence thus: "and the balance of the land *joining* George's plantation where he now lives in Burke County to be equally divided, etc." The testator in fact owned another tract of land *joining* George's plantation. Now, if 350 acres are carved out of the "plantation" which consists of 470, there would be left remaining, 120 of the plantation undisposed of; for the words of the will, "the balance of my land joining George's plantation," do not embrace the plantation itself or any part of it, but do fit and embrace the other land, outside of, but joining the plantation. The contention of the defendants cannot prevail, unless they can show by some established rule of construction that "the balance of my land joining George's plantation" means not only the adjoining land, but a part of the plantation itself. But where the words of a will clearly embrace a particular thing, and do not embrace another, courts are not at liberty to change or enlarge the language of the testator so as to apply to and embrace the other thing; and especially is this so where neither the context of the will nor the general purpose of the testator requires such a construction. Nothing else appearing, the ordinary presumption is that a testator will make an equal distribution of his property among his children. By giving effect to the will as we construe it, we see little or no disparity between the devisees and bequests to them; for while the daughters get more land than two of their brothers, they get fewer slaves; and the other brother, George, apparently gets a larger share than either of the others. So the construction contended for by the defendants derives no support from the other provisions of the will.

2. If 350 acres of land are to be carved out of the plantation and sold, what part is it and how is it to be ascertained? The will does not designate the part, or make any provision for ascertaining and setting it apart. The case is unlike *Harvey v. Harvey*, 72 N. C., 570. (400) There the testator devised to his son A. 250 acres of land, including the buildings which he occupied, and to his son B. 250 acres, including the buildings where he resided, and the residue to be sold and the proceeds to be divided among his other children. The Court, after some hesitation, and that they might not declare the devises void for uncertainty, held that the children were tenants in common, and that it was competent for the court, by intervention of commissioners, to render

that certain which was before uncertain, and thus effectuate the intention of the testator. There the devises were certain to the extent that they included the buildings where each son resided, and thus constituting initial points from which the devises should be ascertained and made certain. But in our case there is no starting point from which the 350 acres can be laid off and set apart. It is true that the executors did carve out of the plantation and sell 350 acres of the land, but it was by a law unto themselves, and as they pleased. None of the parties interested could interpose and say that it should be taken from this or that part of the tract, because all were equally in the dark, where the will was silent.

We do not say that the construction contended for by the defendants would make the devise void for the uncertainty, though *Blakeley v. Patrick,* 67 N. C., 40; *Grier v. Rhyne,* 69 N. C., 346, and *Pemberton v. McRae,* 75 N. C., 497, are strong authorities to that effect; but in endeavoring to ascertain the intention of the testator, which certainly was that his will should take effect, we are not to suppose that he would make a disposition of any part of his property which would subject it to the risk of being declared void, as in *Proctor v. Pool,* 15 N. C., 370.

(401) On the contrary, we feel bound to give the same construction of the will in this case as was given in *Dodson v. Green,* 15 N. C., 488; *Stowe v. Davis,* 32 N. C., 431; *Woods v. Woods,* 55 N. C., 420; *Bradshaw v. Ellis,* 22 N. C., 20. *Woods v. Woods* was a case much like the present, and we think is decisive of it. There the testator devised "the tract of land whereupon I now live and reside, containing 225 acres, more or less." The tract was made up of an original tract, and several others afterwards added, and which had been used by the testator as one plantation. It really contained between 400 and 500 acres, yet it was held that all was conveyed by the terms of the devise.

Our opinion upon the case agreed is that it was the intention of the testator that the whole plantation, composed of the 400-acre tract and the 70-acre tract, should be sold, and the proceeds divided between Sarah Mull and Agnes Settlemoir.

PER CURIAM. Reversed.

Cited: McDaniel v. King, 90 N. C., 603; *Caudle v. Caudle,* 159 N. C., 55; *Lumber Co. v. Lumber Co.,* 169 N. C., 275.

(402)

B. C. MAYO AND OTHERS v. CALVIN JONES AND ANOTHER.

Will—Devisavit Vel Non—Burden of Proof—Insanity—Moral Debasement—Right of Propounder to Open and Conclude.

1. On the trial of an issue of *devisavit vel non*, the burden is upon the caveator to prove the insanity of the testator.

2. On such trial the propounder has the right to open and conclude, the burden of proving the formal execution of the will being upon him.

3. Moral debasement is not necessarily and of itself insanity.

SMITH, C. J., having been of counsel, did not sit on the hearing of this and the next case.

DEVISAVIT VEL NON, tried at Spring Term, 1877, of EDGECOMBE, before *Eure, J.*

The issue was "whether the said paper-writing or any part thereof, and if so, what part, was the last will and testament of Mc. G. Jones." It was in evidence that the testator was not a man of strong mind, and was suffering from physical disease, but was competent to make a will, and had given the directions to his counsel, who wrote it, in an intelligible manner. It was also in evidence that he was a monomaniac about lewd women, publicly indulging in sexual intercourse with them, disgustingly vulgar, and so utterly devoid of moral qualities and feelings as to render him morally a complete brute; was not susceptible to shame, and had no idea of the moral obligations of kinship. He was pronounced insane by physicians who examined him about eight months before he executed his will.

The plaintiffs (legatees and propounders) are the husband and children of a deceased sister of the testator, and the defendants (caveators) are his only brother and sister. The formal execu- (403) tion of the will was proved, and no exception made thereto. The propounders opened and closed the evidence and the argument without objection. The court in charging the jury said that the burden of proving the insanity as alleged was upon the caveators, and that they must satisfy the jury by preponderance of testimony. The caveators excepted to the charge, in that (1) his Honor erred in holding that moral debasement, and want of moral perceptions and appreciation of the obligations of kinship, would not of themselves constitute insanity, and incapacitate one for making a will; (2) his Honor erred in holding the burden of proof to be on the caveators and not on the propounders; and (3) his Honor erred in permitting the propounders to open and conclude. Verdict and judgment for plaintiffs. Appeal by defendants.

Fred. Phillips for plaintiffs.

George Howard, J. L. Bridgers, Jr., and Gilliam & Gatling for defendants.

READE, J. 1. On the trial of an issue *devisavit vel non,* is the burden of proving the sanity of the testator on the propounder? or is the burden of proving his insanity on the caveator? is the first question.

If any one is curious to see how the question is obscured and confounded by conflicting decisions in different States under different statutes and different rules of practice, he may consult 1 Redfield on Wills, sec. 4, and 1 Gr. Ev., sec. 77, and the cases there cited.

We all know that sanity is the natural and usual condition of the mind, and therefore every man is presumed to be sane. *Wood v. Sawyer,* 61 N. C., 251. Admitting that to be the general rule, it is insisted that an exception prevails in the probate of wills. Let us see if that is so in this State.

"No last will or testament shall be good or sufficient in law
(404) . . . unless such last will shall have been written in the testator's lifetime, and signed by him or by some other person in his presence and by his direction, and subscribed in his presence by two witnesses at least, no one of whom shall be interested in the devise or bequest of the estate." Bat. Rev., ch. 119, sec. 1. That is all that is required by the statute.

So, as to deeds, we have the following: "No conveyance of land shall be good and available in law unless the same shall be acknowledged by the grantor or proved on oath by one or more witnesses," etc. Bat. Rev., ch. 35, sec. 1.

Now, it will be seen that so far as the qualifications of the testator in a will and the grantor in a deed are concerned, there is not the slightest difference. Nothing is said about the sanity, or insanity, or capacity, in either.

We would not be excused for citing authority or using argument to show that when a deed is to be proved, all that is necessary is to prove its formal execution; and if incapacity, fraud, or other fault is alleged, it must be proved by him who alleges it.

There is, however, a difference in the *formal probate* of a deed for registration and the *formal* probate of a will. A deed is proved by witnesses or acknowledged by the grantor for registration, for preservation, and for notice, as a substitute for livery of seizin. But the formal proof of a will amounts to more than that. The judge of probate is authorized to take probate of a will in *common form* without notifying the persons interested, and to qualify an executor and grant letters testamentary and to settle and distribute the estate among creditors and devisees

and legatees. He is supposed to act for all parties, and the proceeding is *in rem*. He is expected to make such general inquiries as will protect the interests of all persons interested, and as such persons would make if they were present, and as will satisfy his own mind and (405) conscience. And so he is required to write down the proof which he takes, and file it. And as a guide for him, a formula of the oath of a subscribing witness is contained in the chapter on oaths, just as the form of an executor's oath is given. But the oath is not essential to the validity of the will, nor to its probate, either in common form or in solemn form. And the will may be proved, although the witness be absent or dead, or where they swear directly the reverse of the prescribed oath. And at any rate the prescribed oath is intended exclusively for probates in common form, and is never used on the trial of an issue *devisavit vel non*.

When the probate judge takes probate of a will in common form, when there are no parties present to look after their interests, and he has the interests of all in his hands, it is just and proper that he should satisfy himself, not only of the formal execution of the will, but of the capacity of the testator, because the law attaches great solemnity to his action, and makes his record of probate conclusive as to all the world, until it shall be vacated by a competent tribunal. Bat. Rev., ch. 119, sec. 15.

But when the parties interested come forward and make an issue, and go before a jury to try the validity of a will, it takes precisely the same form, and is governed by the same rules, as the trial of the validity of a deed or any other instrument. And its formal execution being proved by the propounder as required by the statute, *supra*, whatever is alleged by the caveator in derogation, he must prove.

Most of the confusion and conflict of the decisions upon the question has grown out of the fact that the distinction between probate in common form and the trial of an issue *devisavit vel non* before a jury has not been observed.

2. The second question is, The burden of proving insanity being on the caveator, may he not open and conclude?

No. The burden of proving the formal execution is on the (406) propounder; and where there are several issues, and the affirmative of any one of them is on the plaintiff, he begins and concludes. *McRae v. Lawrence*, 75 N. C., 289.

3. The third question is, Did the testator's alleged moral debasement incapacitate him for making a will?

How far the moral debasement of the testator was *evidence* of insanity was proper for the consideration of the jury, and they had the benefit of all the evidence with proper instructions; and they found that it was

not insanity. Moral debasement is unquestionably not necessarily, and of itself, insanity. For it is a lamentable fact that the grossest immorality and considerable intelligence are found together. *S. v. Brandon,* 53 N. C., 463.

PER CURIAM. No error.

Cited: Syme v. Broughton, 85 N. C., 370; *In re Thomas,* 111 N. C., 413; *In re Burns' Will,* 121 N. C., 337; *McClure v. Spivey,* 123 N. C., 681; *In re Hedgepeth,* 150 N. C., 251.

B. C. MAYO AND OTHERS v. CALVIN JONES AND ANOTHER.

Will—Devisavit Vel Non—Discretionary Power of Court as to Costs.

It is within the discretionary power of a court, before which an issue of *devisavit vel non* is tried, to direct the payment of the costs out of the estate.

APPEAL from an order made at Spring Term, 1877, of EDGECOMBE, before *Eure, J.*

The plaintiffs, propounders of the will of Mc. G. Jones, deceased, appealed from so much of the judgment as directs the costs of action to be paid by the administrator with the will annexed out of the assets of the testator's estate, upon the ground that the court had no power to render such judgment. (See preceding case.)

(407) *Same counsel as in preceding case.*

READE, J. His Honor ordered the cost to be paid by the plaintiff executor out of the funds of the estate, although the plaintiff was successful in establishing the will which the defendant caveated. In this we think his Honor was right.

The statute provides that the costs in all cases of caveated wills and testaments shall be paid as the court may in its discretion direct. Bat. Rev., ch. 119, sec. 26.

But it is insisted that that statute is virtually abrogated by C. C. P., secs. 276 and 294. Section 276 provides that "costs shall be allowed of course to the plaintiff upon a recovery in the following cases." And then the cases are enumerated. But this is not one of them. Section 294 provides that "the costs in special proceedings shall be as herein

allowed in civil actions, *unless where otherwise specially provided.*" It is "otherwise specially provided" that costs in this case shall be at the discretion of the Court.

PER CURIAM. Affirmed.

(408)

ROXANNA SIMONTON v. J. H. HOUSTON AND WIFE AND OTHERS.

Widow—Executrix and Devisee Under Husband's Will—Right to Dower or its Equivalent—Form of Proceeding.

1. Where a widow does not dissent from her husband's will, there is no prescribed time within which she must apply for dower; and where she does not dissent and makes no application adverse to her rights under the will, there is no statute and no principle of the common law which bars her right of dower or its equivalent in the lands of her husband.

2. The statute (Rev. Code, ch. 118, sec. 8) secures to a widow a provision out of the lands of her husband in two cases, viz.: (1) where dower is actually assigned, (2) where the husband devises lands to the wife which are presumed to be in lieu of dower.

3. Where the plaintiff in a petition for dower had qualified as executrix under the will of her husband (by which the whole estate, real and personal, was devised to her) and exercised the duties of the office for sixteen months, when, ascertaining that the estate was insolvent, she instituted this proceeding against the creditors of the estate: it was *Held*, that she was entitled to have allotted to her for life such portion of the lands of her husband as she would have been entitled to if he had died intestate.

4. Although no proceeding has been provided by statute for a case where a widow claims the equivalent for dower in the lands of her husband devised to her under his will, yet by analogy she is entitled to the same remedies as are provided in an application for dower.

SPECIAL PROCEEDING for dower, commenced in the Probate Court and tried on appeal at Fall Term, 1877, of IREDELL, before *Cloud, J.*

Robert J. Simonton died in 1876, in Iredell County, leaving a last will and testament in which he named the plaintiff (his widow) his executrix, who instituted this proceeding in June, 1877, against the creditors of her testator, to have her dower allotted. The case agreed states: That said will was duly admitted to probate on (409) 27 February, 1876, and the plaintiff qualified as executrix; that she proceeded to collect the assets of the estate and paid some of the debts of her husband in full; that she *bona fide* supposed the estate was solvent and was worth $75,000 over and above all liabilities during the

entire time within which she was allowed by law to dissent from said will; that thereafter, to wit, after six months from the date of her qualification as executrix, she became satisfied that the estate of her husband was insolvent; and it was agreed that said estate is insolvent, and that by the terms of the will the entire estate, both real and personal, was devised and bequeathed to the plaintiff, and that it was necessary to sell the real estate to pay the debts of the plaintiff's testator.

Upon this state of facts his Honor was of the opinion that the plaintiff was entitled to dower out of the lands described in the pleadings, not exceeding the quantity she would have been entitled to by right of dower had her husband died intestate, and gave judgment accordingly, from which the defendants appealed.

J. M. McCorkle, A. W. Haywood, and G. N. Folk for plaintiff.
R. F. Armfield and M. L. McCorkle for defendants.

BYNUM, J. "Every widow may dissent from her husband's will before the court of probate of the county in which the will is proved, at any time within six months after probate." Bat. Rev., ch. 117, sec. 6. Where the widow does not dissent, there is no prescribed time within which she must apply for dower, and as in this case she enters no dissent to the will and makes no application adverse to her rights under it, there is no statute and no principle of the common law which bars her right of dower, or the equivalent of it, in the lands of the husband. The
(410) case of *Mendenhall v. Mendenhall,* 53 N. C., 287, is therefore not in point.

The claim of the widow in this proceeding is based upon Rev. Code, ch. 118, sec. 8, which is in these words: "The dower of the widow, and also such lands as may be devised to her by his will, if such lands do not exceed the quantity she would be entitled to by right of dower, shall not be subject to the payment of debts due from the estate of her husband during the term of her life." It cannot admit of a doubt that this statute secures and was intended to secure a provision out of the husband's lands to the widow in two cases: (1) where dower has been actually assigned, as in cases of intestacy and dissent from the husband's will, and (2) where the husband devises lands to the wife, which are presumed to be in lieu of dower. In the latter case of a devise the statute expressly secures to the widow for her life such lands "if they do not exceed the quantity she would be entitled to by right of dower."

Dower is a favorite of the law, and cannot be lost or forfeited except for the causes prescribed by statute or the common law. What is the cause of forfeiture alleged here? It is that the plaintiff offered the will for probate, qualified as executrix, and assumed and exercised the duties

of the office for sixteen months before making this application for dower. But what of that? It neither involves a dissent from the will nor a claim adverse to it. By the will she is entitled to all the land, but by this proceeding she proposes to remit her claim to all except one-third of what was devised to her absolutely, and she proposes to take that one-third for life only. The creditors have no cause of complaint, for the widow claims only what the law would have given her exempt from debts, if the husband had died intestate or she had dissented from his will. They are in the same condition, if dower is allowed, as they would have been in case of the intestacy of the husband; and they have no merit of their own, nor is there any default of the widow which entitles them to be placed in a better position. The creditors (411) propose to gain by depriving her of all that the husband gave her by will, or that the law gave her without will. Certainly, consequences so serious, stripping her of all means of support, cannot result from her temporary delusion—a delusion, however, common to the whole community—that the estate was not only solvent, but exceeded its liabilities by $75,000. As soon as she discovered the true condition of the estate (and her *bona fides* is a fact admitted in the case agreed), she instituted these proceedings for dower. The application is in apt time, and there is nothing in it partaking of a dissent from the will inconsistent with its provisions for her benefit, or conflicting with her duties faithfully to discharge the office of executrix. But it is needless to dilate when the law is positive. The statute secures to the widow a provision in lands of equal value to the dower which she would have been entitled to in case of the husband's intestacy. Strictly speaking, it is not dower, for the widow claims under the devise and not against it; but her claim is for lands devised to her, not exceeding in quantity what she would be entitled to by right of dower. The law has pointed out no mode for ascertaining and setting apart this equivalent and substitute for dower; but this beneficent provision for widows will not be allowed to fail for want of an adequate remedy, and by analogy to the mode for allotting dower, the same remedies we think are applicable and proper in cases like the present one; and such are the proceedings here. *Ex Parte Avery,* 64 N. C., 113.

PER CURIAM. Affirmed.

Cited: Brown v. Morisey, 124 N. C., 299; *Lee v. Giles,* 161 N. C., 545; *In re Shuford,* 164 N. C., 134.

(412)

D. D. McBRYDE and Others v. JOHN PATTERSON and Others.

Canons of Descent—Rule XI—Illegitimate Child—Practice—Appeal.

1. Upon the death of an illegitimate child (intestate, unmarried, and without issue), leaving brothers and sisters born of the same mother, some legitimate and others illegitimate, his real estate (under Bat. Rev., ch. 36, Rule 11) descends to his brothers and sisters alike as heirs at law in equal parts.

2. No appeal lies from the refusal of the court below to grant a motion to dismiss the action.

Special proceeding for partition of land, commenced in the Probate Court, and heard on appeal at Fall Term, 1877, of Robeson, before *Moore, J.*

The facts sufficiently appear in the opinion of this Court delivered by the *Chief Justice.* The defendant John Patterson moved to dismiss the proceeding upon the ground that he was sole seized of the land. Motion denied. Appeal by defendant.

Merrimon, Fuller & Ashe for plaintiffs.
Giles Leitch and A. Rowland for defendant.

Smith, C. J. The land to procure partition of which this proceeding was instituted belonged to one Robert Hughes, who acquired it by purchase and died intestate, unmarried, and without issue. He left surviving him a brother, William Gordon, and four sisters, Sarah, Effie, Isabella, and Caroline. The intestate himself and Caroline were illegitimate, and William and the three other sisters legitimate children, born of the same mother. The shares of those born in wedlock are claimed, some of them by the plaintiff, the others by some of the defendants, and the share and estate of Caroline belong to the defendant
(413) John Patterson, the parties in interest and before the Court.

Controversies having sprung up during the progress of the cause in respect to the ownership of some of the shares, successive amendments of the pleadings have been allowed, and new parties introduced to adjust and conclude the conflicting claims thereto among the defendants.

The cause was brought to a hearing before the probate judge on 27 June, 1873, and he on motion dismissed the proceedings, and the plaintiff appealed.

At Fall Term, 1877, the appeal came on to be heard before *Moore, J.,* upon the motion to dismiss on the ground that the entire estate, under Rule 11 of the Canons, descended at the intestate's death to his illegitimate sister, Caroline, who thereby became sole seized of the land, and

the same has been conveyed to the defendant John Patterson. The motion to dismiss was denied, and the court declared that at the intestate's death his land descended to his brother and all his sisters, legitimate as well as illegitimate, as heirs at law in equal parts, and that the sole seizin thereof was not in the defendant John Patterson, and the court adjudged the plaintiffs to be entitled to partition of the land. From this judgment the defendant John Patterson appealed.

The 11th rule of dissent, upon the true construction of which the case depends, is in these words: "Illegitimate children shall be considered legitimate as between themselves and their representatives, and their estates shall descend accordingly in the same manner as if they had been born in wedlock. And in case of the death of any such child or his issue, without leaving issue, his estate shall descend to such person as would inherit if all such children had been born in wedlock: *Provided always,* that when any illegitimate child shall die without issue, his inheritance shall vest in the mother in the same manner as is provided in Rule 6 of this chapter. Bat. Rev., ch. 36, Rule 11. This statute, the proper construction of which determines the rights of (414) the parties in the case before us, in its general scope and terms, is very similar to Laws 1799, ch. 522, upon which an interpretation was put in the case of *Flintham v. Holder,* 16 N. C., 345. This act was as follows: "When any woman shall die intestate, leaving children commonly called illegitimate or natural born out of wedlock, and no children born in lawful wedlock, all such estate whereof she shall die seized or possessed of, whether real or personal, shall descend to and be equally divided among such illegitimate or natural born children, and their representatives, in the same manner as if they had been born in wedlock; and if any such illegitimate or natural born child shall die intestate without leaving any child or children, his or her estate, as well real as personal, shall descend to and be equally divided among his or her brothers and sisters born of the body of the same mother, and their representatives, in the same manner and under the same regulations and restrictions as if they had been born in lawful wedlock; any law, usage, or custom to the contrary notwithstanding." James Flintham, an illegitimate son of Ailsey Flintham, died intestate, leaving no widow, child, or other issue, and possessed of a considerable personal estate, which went into the hands of Thomas Holder, his administrator. The intestate had a brother and two sisters who were born in lawful wedlock of the same mother.

Ruffin, J., in delivering the opinion of the Court, quotes the statutes, and proceeds thus: "If there be none but bastards, unquestionably they succeed to each other; but if the intestate have two sets of brethren, one legitimate and the other illegitimate, then, it is contended, neither suc-

ceeds, or the bastard only; and if he leave legitimate brethren only, that they are excluded. The point is not entirely new. It was decided in a case where there were two lines, by the late Supreme Court. *Arrington v. Alston,* 4 N. C., 727; *s. c.,* 6 N. C., 321. The descent was held
(415) to be to both equally; but as the question was not much debated there, the Court is willing to reconsider it."

He then proceeds to criticise the words of the act, and its purposes and policy, and says: "If, then, bastard brothers may inherit to each other, notwithstanding the existence of legitimate brothers, may not the legitimate brothers in such case succeed as coheirs? The opinion of the Court is that they do. It seems to follow necessarily from the act, if the positions already taken be true; for if the act in its true meaning is not confined to the case when there are none but bastards, and illegitimates may be heirs to each other, though there be legitimates, the latter must also be heirs." And again he continues: "There is no provision for a descent from a legitimate to a bastard. The descent from bastards is alone within the provision. Hence bastards can never inherit but from the mother and each other. But the reasons on which the legitimates constituted sole heirs of the mother alike require that they should be coheirs of the bastards. . . . It follows that the brethren born in wedlock succeed to a bastard brother in like manner when that line exists by itself, and there is no surviving bastard brother or sister."

We have quoted largely from the opinion as to the proper construction of the act as it was passed in 1799, because the reasoning of the Court applies with undiminished force to the law with the modifications it has since undergone, and as it now appears among the rules of descent, in the aspect we are now considering it. It can scarcely be supposed that the subsequent changes in phraseology, more than in matter, were intended to subvert a construction so long acquiesced in, and so just and reasonable in itself, and thus an act professing to remove in certain cases the disabilities of bastardy should be made to confer upon bastards rights and privileges in respect to inheriting superior to those possessed by persons born in wedlock. We think the purpose of the act and
(416) its true meaning to be the removal of those disabilities, so that in such case bastards may participate equally with those born in wedlock.

We do not think that the cases to which our attention has been called impair the force or authority of the decision in *Flintham v. Holder.* In *Sawyer v. Sawyer,* 28 N. C., 407, it is held that land devised by a grandmother to the illegitimate child of a legitimate daughter of the testatrix did not descend upon the death of the devisee intestate and without issue to a legitimate son of the testatrix, who was brother of the intestate's mother. And in *Ehringhaus v. Cartwright,* 30 N. C., 39, the Court

decide that while an illegitimate brother can inherit from his illegitimate sister of the same mother, he cannot inherit from a legitimate daughter of the sister. This decision following the other is worded in the form of the present law, by adding after the words, "and in case of the death of any such child," the words, "or his issue," which were not in the act when the case was decided in 1846. So that now an illegitimate brother or sister can inherit lands descended from the issue of an illegitimate brother or sister, as well as from such brother or sister.

We have discussed and expressed our opinion upon the question involved in the defendant's motion to dismiss, and which we suppose it is the wish of the parties should be decided in this Court. But there is another fatal obstacle in the defendant's way, in that he appeals from the refusal of the judge on his motion to dismiss the action. This we have said is not a judgment from which an appeal will lie. *Mitchell v. Kilburn,* 74 N. C., 483.

The appeal must therefore be dismissed, and the parties left to proceed with the cause in the court below.

PER CURIAM. Appeal dismissed.

Cited: Sutton v. Schonwald, 80 N. C., 23; *R. R. v. Richardson,* 82 N. C., 344; *Gay v. Brookshire, ib.,* 411; *Powers v. Kite,* 83 N. C., 158; *Turlington v. Williams,* 84 N. C., 127; *S. v. Lockyear,* 95 N. C., 640; *Scroggs v. Stevenson,* 100 N. C., 358; *Baker v. Garris,* 108 N. C., 226; *Guilford v. Georgia,* 109 N. C., 313; *Cameron v. Bennett,* 110 N. C., 278; *Milling Co. v. Finley, ib.,* 413; *Joyner v. Roberts,* 112 N. C., 114; *Farthing v. Carrington,* 116 N. C., 335; *Bettis v. Avery,* 140 N. C., 188; *Kenney v. R. R.,* 167 N. C., 15.

---

(417)

CITY OF GREENSBORO AND STATE v. J. H. SHIELDS AND ANOTHER.

Chief Officers of Cities and Towns—Criminal Jurisdiction—Prosecution Under City Ordinance.

1. A justice of the peace has final jurisdiction over affrays, on compliance with the required preliminary conditions.
2. A chief officer of a city or town has the same criminal jurisdiction within the corporate limits as is given to justices of the peace; but the statutory requisites which confer final jurisdiction must be complied with.
3. A prosecution under a city ordinance must fail if no ordinance is set out in the proceedings as having been violated.

STATE *v.* DUNSTON.

APPEAL from *Buxton, J.*, at Fall Term, 1877, of GUILFORD.

The mayor of Greensboro issued a warrant for an affray against the defendants in the above entitled action, and upon the trial before him they were adjudged guilty and a fine imposed, from which judgment the defendant Shields appealed; and his Honor, upon motion of defendant's counsel, dismissed the case, for that the mayor had no jurisdiction, nor was the particular city ordinance alleged to have been violated specifically set out in the warrant; and from this ruling Staples, city attorney, appealed.

Merrimon, Fuller & Ashe and J. N. Staples for the City of Greensboro.

J. T. Morehead for the defendant.

BYNUM, J. The chief officer of cities and towns has the same criminal jurisdiction within the city limits as is given to justices of the peace; and justices of the peace have final jurisdiction over affrays, the (418) offense specified in this proceeding, on a compliance with certain preliminary conditions. Bat. Rev., ch. 33, sec. 115, and ch. 111, sec. 30.

If, therefore, this action had been commenced in the name of the State only, and in compliance with the statutory requisites which confer final jurisdiction, it would have been lawful for the mayor to try and punish these offenders as he has done.

But as a State prosecution, the conviction was improper, because no jurisdiction had been acquired, for the reason that no complaint had been filed by the party injured, and collusion with the accused had not been negatived. Bat. Rev., ch. 33, sec. 119.

As a city prosecution, it must also fail, because no ordinance is set out in the proceedings as having been violated. One cannot be criminally convicted without an accusation, an offense charged.

PER CURIAM. Affirmed.

Cited: Hendersonville v. McMinn, 82 N. C., 534.

STATE v. B. H. DUNSTON.

Indictment—Abandonment of Wife—Autrefois Convict.

A husband once convicted of an abandonment of his wife (under Bat. Rev., ch. 32, sec. 119) cannot be again tried for the same offense, he not having lived with her since the original abandonment.

STATE *v.* DUNSTON.

MISDEMEANOR, tried at November Term, 1877, of WAKE Criminal Court, before *Strong, J.*

The defendant was charged with abandonment of his wife, and pleaded former conviction, and the jury returned a special verdict as follows:

1. On 22 May, 1877, the defendant abandoned his wife without providing for the adequate support of herself and her child (419) begotten upon her by the defendant.

2. At August Term, 1877, of this court, the defendant was indicted and convicted of said abandonment.

3. The defendant has not lived with his wife since the said 22 May, and has failed to provide adequate support for her and her child, and so continued to fail to provide such support on 1 October, 1877.

His Honor upon these facts sustained the plea of the defendant, and held that he was not guilty as charged in the bill of indictment, from which judgment Devereux, solicitor for the State, appealed.

A. M. Lewis and D. G. Fowle, who prosecuted in the court below, appeared with the Attorney-General for the State.

T. R. Purnell and T. M. Argo for defendant.

FAIRCLOTH, J. "If any husband shall willfully abandon his wife without providing adequate support for such wife and the child or children which he has begotten upon her, shall be deemed guilty of a misdemeanor," etc. Bat. Rev., ch. 32, sec. 119.

Under this statute the defendant was indicted and convicted, and soon after was again indicted, not having lived with or provided support for his wife since the time he abandoned her in the first instance, to which he pleaded *autrefois convict.*

Is this a continuous abandonment, and indictable? In another case the husband abandoned his wife before the passage of the act, and continued to neglect to provide her with support, and did not return after its passage, for which he was indicted; and it was held that he was not guilty, on the ground that the gist of the offense was the act of separation and not merely its continuance, and we adhere to the same conclusion. *S. v. Deaton,* 65 N. C., 496. (420)

Statutes intending to make an act punishable from day to day are usually drawn in express terms or by plain inference. No such language is employed in the statute under consideration.

PER CURIAM. Affirmed.

Cited: S. v. Davis, 79 N. C., 603.

STATE v. ALBERT JONES.

Indictment—Assisting Prisoners to Break Jail—Defective Indictment.

An indictment for assisting prisoners to break jail which does not allege that such prisoners had committed any offense, or state facts or circumstances from which the court can see that they were lawfully in prison, is fatally defective.

The transcript of the case sent to this Court sets out an indictment against the defendant for an attempt to assist prisoners to break jail, which was found at Spring Term, 1877, of WAYNE, and states: "That the defendant by his attorney agrees to submit and does submit to the judgment of the court upon the following facts, namely: It is a fact that Joe Brown, George Holland, and Cæsar Whitfield were prisoners in the common jail of Wayne County; that the defendant, Albert Jones, did cause to be carried to said prisoners, while in jail, one adz and one bar of iron, without the consent of Haynes Thompson (jailer), as alleged. The defendant insists that he is not guilty under the bill of indictment, because . . . it is not alleged in said bill for what offense said prisoners were confined in the common jail, nor that they were convicted of any crime.

If the court is of opinion that the defendant is guilty of any (421) offense under said bill upon the facts as above stated, and if the Supreme Court should affirm the opinion of the court below, then the defendant consents to whatever judgment may be just and proper in the discretion of the court. Upon the *case agreed* it is considered by the court that the defendant is guilty, and that he be confined in the county jail for six months." Appeal by defendant.

Attorney-General for the State.
John D. Kerr for the defendant.

FAIRCLOTH, J. We cannot dispose of this case without calling attention to the gross irregularities and omissions apparent on the record. The name of no witness is indorsed on the bill of indictment, and it does not appear that a single witness was sworn, sent, or heard before the grand jury. The name of the foreman is not upon the bill, nor does it appear that it was ever returned into court. We cannot see that it was found "A true bill" or "Not a true bill," and it does not appear that any confession or plea was entered, nor that any evidence was heard or trial had, nor by whom the judgment was rendered. No verdict whatever was entered, and although it was probably intended that the agreed facts should be taken as a special verdict, it may be gravely considered whether the State and the defendant in a criminal action can agree upon facts to be considered as a special verdict, when no verdict is in fact rendered. Whether these errors occurred from inadvertence, negligence, or inten-

tion, can make no difference. They cannot be tolerated. The liberty of the citizen and a due regard for the forms of law forbid it. Which of said irregularities would or would not be fatal it is unnecessary to decide now, as the present case will not turn upon any of them.

Our opinion rests upon another and a fatal objection to the (422) action:

The bill alleges that certain persons were "prisoners and in the custody of one Thompson in the common jail," and that the defendant was trying to aid their escape. It does not allege that they had committed any offense for which they might be detained, nor any facts or circumstances from which the Court can see that they were lawfully in jail. No mittimus, conviction, or other authority is alleged for their imprisonment. In this particular the bill is bad. It follows, of course, if the Court cannot say that the prisoners were lawfully in jail, it cannot say that the defendant committed an offense in trying to help them out. Even in a case where it was alleged in the bill that the prisoner was arrested by "lawful authority," and no facts, etc., were set forth by the grand jury, this Court held that to be clearly insufficient and the bill defective. *S. v. Shaw,* 25 N. C., 20. All the precedents and recognized authorities support this view.

We are therefore of opinion that judgment ought not to have been pronounced against the defendant.

PER CURIAM. Judgment arrested.

Cited: S. v. Baldwin, 80 N. C., 393; *S. v. Padgett,* 82 N. C., 546.

---

(423)

STATE v. GILES DRIVER.

Indictment—Assault and Battery—Unconstitutional Judgment.

1. A sentence of imprisonment for five years in the county jail and a recognizance of $500 to keep the peace for five years after the expiration thereof upon a defendant convicted of assault and battery, is unconstitutional.

2. The judgment in such case is reviewable, and the decision of this Court will be certified to the court below, to the end that a regular and proper judgment may be entered.

PETITION for a writ of *certiorari,* by defendant, and granted at June Term, 1877, of the SUPREME COURT.

The record states substantially: On 22 May, 1877, the defendant caused a notice to be served by the sheriff upon the solicitor of the dis-

trict, of his intention to apply for a writ of *certiorari,* and on the following day a copy of his petition was likewise served. He stated in his petition that he had been indicted for an assault and battery upon his wife, committed in the month of June, 1876; that he pleaded guilty to the indictment and submitted to the judgment of the court; that the evidence adduced was substantially that while under the influence of passion and the effects of ardent spirits, he whipped his wife with a switch in a field near his house, with such severity as to leave marks of the strokes of the switch visible on her arms and shoulders for two or three weeks, and at the conclusion of the whipping he gave her one kick; that his wife testified that at previous times while under the influence of liquor he had chastised her, but with much less severity; that he is advised that the judgment (which is set out in the petition) imposed on him is erroneous and illegal, and that he has the right to have the same reviewed; that he was unable to secure legal services until recently, by reason (424) of his poverty, or to take the necessary steps to appeal, and ought not to be held guilty of laches in the premises; and he therefore asked that a writ issue to the clerk of the Superior Court of Yadkin County, commanding him to transmit to this Court a full and complete transcript of the record in the case, and that said judgment be reviewed and reversed. The petition was verified by the oath of defendant, and the prayer thereof was granted by this Court at the last term by an order, which is as follows: "There are two questions involved: (1) Is the sentence, five years imprisonment in the county jail, and then a recognizance with sureties in $500 to keep the peace for five years longer, in conflict with that provision of the Constitution which prohibits excessive fines and cruel or unusual punishments? (2) If it is, has this Court the power to review it? We forbear the expression of any opinion until the questions can be argued. The *certiorari* will issue according to the prayer of the petitioner." In obedience to said order, the clerk of said Court on 31 December, 1877, sent a transcript of the record, copy of the bill of indictment charging the assault, the verdict of guilty, and the judgment of the court, that defendant be imprisoned for five years in the county jail and at the end of that term to enter into bond with sufficient security in the sum of $500 to keep the peace for five years towards his wife and all other good citizens, and then to be discharged according to law.

Attorney-General for the State.
J. A. Gilmer for the defendant.

READE, J. "Excessive bail should not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted." Const., Art. I, sec. 14. This is a provision in our State Constitution and in the Consti-

tution of the United States, and is a copy of the English Bill of Rights. The defendant was indicted for an assault and battery upon his wife, and was convicted and sentenced to imprisonment in the (425) county jail for the space of five years, and at the expiration thereof to give security to keep the peace for five years in the sum of $500, with sureties. Being unable from poverty to appeal, he files his petition in this Court for a *certiorari* to bring up the case for review, upon the ground that the sentence was violative of the Constitution, in that it imposes upon him "cruel and unusual punishment."

We have no information of the particulars of the charge against him except what he states in his petition. He states that while in a passion and under the influence of drink, he whipped his wife with a switch with such severity as to leave the marks for two or three weeks, and that he kicked her once, and that he had whipped her before, but not with the same severity, and that when brought to trial he pleaded guilty and submitted.

Taking that statement to be true, it would seem that he is a bad man, and not likely to have much of the public sympathy. And it is not unnatural that his Honor should have been moved to some severity against him. But still there are two questions for us to determine: first, Is the sentence of the court unconstitutional? and, second, Is it a matter which we can review?

In *S. v. Miller,* 75 N. C., 73, which was an assault with intent to kill, the defendant was sentenced to five years imprisonment in the county jail. A new trial was given on other grounds, and it was not necessary that we should decide whether the punishment was lawful, but we clearly intimated our opinion that it was not. We stated that the oldest member of this Court did not remember an instance where any person had been imprisoned five years in a county jail for *any* crime, however aggravated. And no instance was cited at the bar, in the argument of that case, or this, although inquiry was made of the bar, of such a (426) term of imprisonment. We have examined our Rev. Code which was prior to our penitentiary system and to our Constitution of 1868, when imprisonment was altogether in the county jails, and unless we have inadvertently overlooked some crime, there was none the punishment whereof was for so long a time. In many cases the punishment was specified; in others it was not to be less than so and so; in others, not exceeding so and so; and in others, at the discretion of the court; these last being generally *small offenses* where it was *not usual to punish much;* and to cover all cases of felony where the punishment was not specific, there was the following provision: "Every person who shall hereafter be convicted of any felony for which no specific punishment shall be prescribed by statute, and which is now allowed the benefit of

clergy, shall be imprisoned at the discretion of the court, not exceeding two years; or if the offense be infamous, the court may also sentence the convict to receive one or more public whippings, to stand in the pillory, or pay a fine, regard being had to the circumstances of each case." Rev. Code, ch. 34, sec. 27.

And in regard to misdemeanors, where the punishment was not specific, they were to be punished as at common law. Rev. Code, ch. 34, sec. 120.

So it appears that in clergyable felonies, however aggravated, imprisonment was limited to two years in all cases where the punishment was not specific; and it has escaped our attention if in any case imprisonment was prescribed exceeding two years, except in the cases of embezzlement by the State Treasurer, and in counterfeiting and forgery, where it might be three years. It would seem to be clear that what is greater than has ever been prescribed or known or inflicted must be "excessive, cruel, and unusual."

Now, it is true, our terms of imprisonment are much longer; but they are in the penitentiary, where a man may live and be made useful;
(427) but a county jail is a close prison, where life is soon in jeopardy, and where the prisoner is not only useless, but a heavy public expense.

Taking it to be that the sentence is unlawful, is it subject to review, or is it *entirely* discretionary with the judge below? An unlawful, unconstitutional judgment of an inferior court affecting the liberty of the citizen, not the subject of review by the court of appeals, where every order or judgment involving a matter of law or legal inference is reviewable! There cannot be a doubt about it. There is no such anomaly.

It is true that we find very little authority about it, which is probably owing to the fact that the administration of our criminal law is so uniformly humane that there is seldom occasion for complaint. *Mr. Justice Story,* in commenting on this provision of the Constitution of the United States, says: "The provision would seem to be wholly unnecessary in a free government, since it is scarcely possible that any department of such a government should authorize or justify such atrocious conduct. It was, however, adopted as an admonition to all departments of the National Government to warn them against such violent proceedings as had taken place in England in the arbitrary reigns of the Stuarts. In those times a demand of excessive bail was often made against persons who were odious to the court and its favorites, and on failure to procure it, they were committed to prison. Enormous fines and amercements were also sometimes imposed, and cruel and vindictive punishments inflicted. Upon this subject *Mr. Justice Blackstone* has wisely remarked that sanguinary laws are a bad symptom of the distemper of any State, or at least of its weak Constitution." 3 Story Const., sec. 1896.

It is true that there never has been anything in our government, State or National, to provoke such provision; yet it was thought to be so appropriate that it was adopted into our Bill of Rights, and has ever been preserved in our fundamental law, as a "warning." Nor was it intended to warn against merely erratic modes of punishment or torture, but applied expressly to "bail," "fines," and "punish- (428) ments." And the earliest application of the provision in England was in 1689, the first year after the adoption of the Bill of Rights in 1688, to avoid an excessive pecuniary fine imposed upon Lord Devonshire by the Court of King's Bench. 11 State Trials, 1354.

His Lordship committed an assault and battery on Colonel Culpepper in Whitehall, and was tried before the King's Bench, and fined £30,000. It does not appear that there was any appeal, but the case was considered in the House of Lords, and is very valuable for what was said and done. There were three objections considered by the House of Lords to the judgment of the King's Bench: (1) That it was a breach of privilege. (2) That the fine was excessive. (3) The commitment till paid. The judges of King's Bench were summoned before the House of Lords to give their reasons. The law lords were asked for their opinions, and after full consideration the House of Lords declared "that the fine of £30,000 imposed by the Court of King's Bench upon the Earl of Devon was excessive and exorbitant, against Magna Carta, the common right of the subject, and the law of the land." In the discussion it was said: "The law for the most part left fines to the discretion of the judges, yet it is to be such discretion as is defined by my Lord Coke, fol. 56, '*discretio est discernere per legem quid sit justum,*' not to proceed according to their own will and private affection, for '*talis discretio discretionem confundit.*' So the question is not, whether the judges could fine my Lord Devonshire, but whether they have kept themselves within the bounds and limits which the law has set them."

And again it is said in the same case: "It is so very evident as not to be made a question whether in those things which are left to the discretion of the judges, that the law has set them bounds and limits, which, as God says to the waves of the sea, 'Hitherto shalt thou (429) go, and no farther.' . . . But if the judge may commit the party to prison till the fine be paid, and withal set so great a fine as is impossible for the party to pay, then it will depend upon the judge's pleasure whether he shall ever have his liberty, and thus every man's liberty is wrested out of the dispose of the law and is stuck under the girdle of the judges."

Thus is appears both by precedent and by the reason of the thing, and by express constitutional provision, that there is a limit to the power of the judge to punish, even when it is expressly left to his dis-

cretion. What the precise limit is, cannot be prescribed. The Constitution does not fix it, precedents do not fix it, and we cannot fix it, and it ought not to be fixed. It ought to be left to the judge who inflicts it under the circumstances of each case, and it ought not to be abused, and has not been abused (grossly) in a century, and probably will not be in a century to come, and it ought not to be interfered with, except in a case like the present, where the abuse is palpable. And when that is the case, then the sleeping power of the Constitution must be waked up to protect the oppressed citizen. The power is there, not so much to draw a fine line close up to which the judges may come, but as a "warning" to keep them clear away from it.

An argument against the power to review is, that it cannot be made practical, for *we* cannot fix the punishment, but must send the case back to the court below to fix the punishment, and in that case the judge below may abate so little of the punishment as to amount to nothing. The judge below will do no such thing. Our judges do not act capriciously. We are to suppose that the error already committed was inadvertent, and that the judge below will do precisely right. If the contrary could be supposed, it would be easy to correct a future error, as the past is corrected.

And again it is said that it ought to be left to the pardoning power.

No, it ought not. The Judiciary ought to be a complete system,
(430) capable of affording every remedy while it has the subject and the party before it. After these have passed beyond its action, and something supervenes to make it necessary, then the pardoning power may be invoked; and seldom, if ever, in any other case. The Judiciary ought not to admit, and the pardoning power ought not to suppose, that it has done its work imperfectly.

In *Lord Devonshire's case* a safe rule is laid down by which to judge of the reasonableness of punishment: "There are two things which have been heretofore looked upon as very good guides: (1) what has formerly been expressly done in like cases, and (2) for the want of such particular discretion, then to consider that which comes nearest to it." If these rules are observed, the punishment will be such as is "usual," and therefore not "excessive" or "cruel."

We have already said that the punishment in this case is not only "unusual," but unheard of, and that it is "cruel." It is therefore in violation of the Constitution, and it is our duty so to declare it.

In 1868-69 the Legislature passed an act giving to justices of the peace jurisdiction of assaults and batteries where no deadly weapon was used and no serious damage done. And again in 1873-74 the same jurisdiction was given where there was no intent to kill and no deadly weapon used or serious damage done. And a magistrate could not punish by

imprisonment exceeding one month. In the case before us there was no intent to kill, no deadly weapon, and no serious (in the sense of dangerous) damage done. That would seem to be a clear expression of the legislative will that the punishment in this case ought not to exceed one month's imprisonment.

There was a motion here in arrest of judgment. But that cannot be allowed. An appeal in a criminal case vacates the judgment, and a *certiorari* as a substitute for an appeal has the same effect. So that there is no judgment below, and *we* cannot render judgment (431) in a criminal case; and yet the verdict of guilty stands below; and the verdict is regular and proper and there must be a judgment upon the verdict. All that we can do is to declare that there is error in the judgment rendered, and have our decision certified, to the end that the proper judgment may be rendered below. *S. v. Cook,* 61 N. C., 535; *S. v. Manuel,* 20 N. C., 20.

PER CURIAM. Reversed and remanded.

Cited: S. v. Pettie, 80 N. C., 369; *S. v. Reid,* 106 N. C., 716; *Bryan v. Patrick,* 124 N. C., 662; *S. v. Farrington,* 141 N. C., 845; *S. v. Lee,* 166 N. C., 256; *S. v. Lancaster,* 169 N. C., 285.

STATE v. JOHN P. ROBBINS.

Indictment—Assault and Battery—Judge's Charge.

Where on the trial of an indictment for an assault and battery, committed upon the prosecutor, a school teacher while engaged in his school, the court charged the jury that "if the defendant went to the schoolhouse for a lawful purpose, and after he got there he brought on the affray by any language or conduct of his own, he would be guilty": *Held,* not to be error.

ASSAULT and battery, tried at Fall Term, 1877, of WATAUGA, before *Cloud, J.*

The defendant and his three sons were indicted for an assault upon one Purley. The prosecutor testified, among other things, that he was teaching a common school under a contract with two of the school committee of the district; that the defendant, who was the other member of said committee, upon passing the schoolhouse, went to the door thereof and inquired of the witness what he was doing; he in- (432) formed him he was teaching school, having been employed by the other two committeemen; that defendant denied this statement and

called the witness a liar, and the witness struck him and knocked him out of the door. There was much other evidence tending to show that the parties cursed each other, and that the prosecutor also called the defendant a liar. His Honor in his charge to the jury said: "If the defendant went to the schoolhouse for a lawful purpose, and after he got there he brought on the affray by any language or conduct of his own, he would be guilty." (See *S. v. Perry,* 50 N. C., 9.) Defendant excepted. Verdict of guilty as to two of the defendants. Judgment. Appeal by defendants.

Attorney-General and G. N. Folk for the State.
No counsel for the defendants.

FAIRCLOTH, J. After hearing and considering the conflicting evidence, the jury by their verdict have said the defendants were guilty. No error in the conduct of the action has been pointed out to us, and we are unable to discover any in the record. Let this be certified in order that judgment may be pronounced.

PER CURIAM. Affirmed.

Cited: *S. v. Davis,* 80 N. C., 353; *Saunders v. Gilbert,* 156 N. C., 475.

---

(433)

STATE v. HECTOR DAVIS.

Assault With Intent to Commit Rape—Effect of Impeaching Evidence —Judge's Charge.

1. Evidence introduced by the State on the trial of a criminal action for the purpose of impeaching the testimony of a witness for defendant can have that effect only, and cannot be considered by the jury as substantive evidence of the defendant's guilt.

2. On the trial below it was in evidence that a certain witness introduced for defendant had made statements inconsistent with her testimony on the trial; the defendant asked the court to charge "that the evidence could be considered by the jury only for the purpose of impeaching the testimony of the witness, and not as substantive evidence of defendant's guilt"; the court charged "that if the jury believed from the evidence that the two statements were inconsistent, then it would be for them to say whether her first statement or her evidence at the trial was the truth": *Held,* to be error; the court should have guided the minds of the jury as to the application of the impeaching evidence.

STATE *v.* DAVIS.

ASSAULT with intent to commit rape, tried at June Term, 1877, of NEW HANOVER Criminal Court, before *Meares, J.*

It was in evidence that the prosecutrix, upon going a short distance from the house in which she lived to get some dry brush for fuel, was approached by the defendant, who asked her if she did not want him to cut some wood for her. She replied that she did not, and upon her refusal to sundry other propositions made by him, he seized her and threw her down; she screamed and cried out in a loud voice; a scuffle ensued, in which he gave her a severe blow in the face, and then ran off. The stepfather of the prosecutrix, with other persons, went in search of the defendant, and when arriving at the place where the difficulty occurred, they found a pipe stem (which was exhibited on the trial), with certain marks upon it. The evidence in regard to (434) this pipe stem was relied on among other things as an important circumstance by which the defendant could be identified as the party charged with committing the assault upon the prosecutrix, by whom he was not known at that time.

The evidence for the State, as testified to by one Arlington Howard and York Ellington, was, that they went to the house of one Jane Ross on the morning after the alleged assault, and exhibited said pipe stem to her, and in reply to their question she stated that the pipe stem belonged to the defendant, and that he was smoking it at her house on the day of the alleged assault.

The defendant introduced Jane Ross, who testified that she had seen his pipe stem often and knew it well, and that she was positive the one produced at the trial was not his. This witness also swore that when the above named witnesses came to her house, as testified to by them, she did not tell them that she believed it was defendant's pipe stem, but only looked like it. The State then recalled said witnesses to contradict the statement of Jane Ross, and their testimony relating to the pipe stem was substantially the same as that elicited on the first examination.

The defendant's counsel asked the court to charge the jury that the testimony of Howard and Ellington could only be considered by them for the purpose of impeaching the testimony of Jane Ross, and not as substantive evidence of the defendant's guilt. His Honor, intending to assent to the prayer of the counsel, responded by saying to the jury, after recapitulating the testimony, that if they believed said witnesses, Jane Ross had made a statement to them as to the identification of the pipe stem totally inconsistent with the statement she had made upon this trial; that if they should come to the conclusion these two witnesses told the truth, then it would be for them to determine whether Jane Ross had told the truth in her statement to them, or had told the truth in her statement made on this trial; and that the jury (435)

might take into consideration the fact that the statement made to two witnesses was not under the sanctity of the oath, while her statement made on this trial was under oath. Defendant excepted. Verdict of guilty. Judgment. Appeal by defendant.

Attorney-General for the State.
D. L. Russell for the defendant.

FAIRCLOTH, J. A party may impeach the credibility of his adversary's witness, and one of the several modes of doing so is by showing that the witness at some previous time has made statements inconsistent with his evidence on the trial. And when two witnesses testify contradictory before the jury, in regard to a fact relevant to the issue, it becomes highly important for the jury to know which one is more entitled to credit. This information is to be obtained as best it can, and in various ways, as from the proof of character, cross-examination, demeanor and bearing of the witness, proof of other facts and surrounding circumstances, etc., and it is quite certain that a knowledge that one of the witnesses had made an inconsistent statement at another time, touching the same matter, unless explained, would have its effect on the minds of the jurors in their search for a correct conclusion on the main issue.

The defendant called Jane Ross, who testified that a certain pipe stem, exhibited on the trial, was not the pipe stem of the defendant, and that she had previously said at her house that it looked like his, but that she soon thereafter satisfied herself that it was not. The solicitor was then allowed to contradict her, by showing that she made a statement at her house at the time alluded to, totally inconsistent with her evidence on the trial. Assuming, for the purpose of this case, that
(436) a proper foundation was laid for the admission of the impeaching evidence, and further, that her statements were contradictory, the question arises, What is the proper office of the impeaching evidence and for what purpose should the jury consider it? The defendant's counsel prayed the court to charge the jury "that it could be considered by them only for the purpose of impeaching the testimony of Jane Ross, and not as substantive evidence of the defendant's guilt." His Honor, "intending to assent to the prayer," told the jury in substance that if they believed from the evidence that the two statements were inconsistent, then it would be for them to say whether her first statement or her evidence at the trial was the truth. This plain proposition was true, but it was no response to the prayer of the defendant. The instruction prayed was proper (*S. v. Brown,* 76 N. C., 222), and the failure to give it permitted the jury to consider the *fact* of contradiction as *substantive* evidence of the defendant's guilt, and not simply as evidence affecting

the credibility of the witness Jane Ross. The court should have guided the minds of the jury in the application of the impeaching evidence. This conclusion makes it unnecessary to consider other exceptions.

PER CURIAM. *Venire de novo.*

Cited: *Lord v. Beard,* 79 N. C., 13.

---

(437)

STATE v. MILLARD F. DANCY.

Indictment—Assault With Intent to Commit Rape—Judge's Charge.

On the trial of an indictment for an assault with intent to commit rape, where there was evidence that the defendant (a boy of 15) had been found on the prosecutor's child (a girl of about 6), she being on her back with her clothes up, etc.: *Held,* to be error for the court in its charge to the jury to remark with emphasis, "Why was she on her back, and why was he on her?" as violative of the act, Rev. Code, ch. 31, sec. 130.

ASSAULT with intent to commit rape, tried at Fall Term, 1877, of WILKES, before *Cloud, J.*

It was in evidence that the defendant was in the employment of the father of the female child under 10 years of age, upon whom the offense was alleged to have been committed, and on a certain occasion, the father hearing a noise therein, went to his barn and found the defendant on the child, she being on her back with her clothes up, and discovered other evidences of improper intercourse. Both the defendant and the child were chastised by the father. The defendant was about 15 years of age. The exception to the charge of his Honor, which is the basis of the decision of this Court, is embodied in the opinion delivered by *Mr. Justice Bynum.* Verdict of guilty. Judgment. Appeal by defendant.

Attorney-General for the State.
No counsel for the prisoner.

BYNUM, J. The prisoner, a boy of 15 or 16 years of age, was convicted of an assault with an intent to commit rape upon a female child of the age of 6 years. The exception of the prisoner is to (438) the judge's charge to the jury.

The prisoner's counsel in his argument to the jury attempted to show from the evidence that the prisoner did not have the intent to commit

the offense charged. The case then states that "His Honor, in commenting upon the testimony, and referring to the theory of the State, remarked with emphasis, 'Why was she on her back, then? and why was he on her? The counsel for the State asked, why was it, if you believe the testimony.' His Honor at no time referred to the theory or argument presented by the counsel of the prisoner." So much of the charge is transcribed as presents the exception, but no other part of it explains or qualifies the language above set forth. The exception is that this language was an expression of the opinion of the court as to the guilt of the prisoner, and was a violation of the act, Rev. Code, ch. 31, sec. 130. The parties had taken issue upon these very facts, as indicating or not indicating the intent charged, and upon which the judge, by his language and emphasis, as we think, very clearly intimated an opinion adverse to the prisoner. It was at this material point in the dispute, especially, that the statute restrained, and was intended to restrain, the judge from any expression of opinion to the jury upon the facts in evidence. *S. v. Angel,* 29 N. C., 27; *S. v. Dixon,* 75 N. C., 275; *Crutchfield v. R. R.,* 76 N. C., 320.

As the evidence appears in the record, it may well admit of doubt if there was that felonious and wicked intent on the part of this boy which constitutes the crime charged. It was certainly an offense which called for the severe discipline of the domestic forum, and to a certain extent that seems to have been inflicted.

PER CURIAM. *Venire de novo.*

Cited: Williams v. Lumber Co., 118 N. C., 939; *S. v. Howard,* 129 N. C., 673; *Withers v. Lane,* 144 N. C., 188; *Speed v. Perry,* 167 N. C., 127.

(439)

STATE v. ROBERT BRITT.

Bastardy—Evidence.

1. On the trial of a prosecution for bastardy, evidence that the prosecutrix had criminal intercourse with another man about the time when in the course of nature the child must have been begotten, and that such intercourse was habitual, is admissible.

2. On such trial, evidence that the child resembled the man with whom such alleged intercourse was had is also admissible.

ISSUE of paternity in a proceeding in bastardy, tried at Fall Term, 1877, of ROBESON, before *Moore, J.*

The case is sufficiently stated by the *Chief Justice* in delivering the opinion of this Court. Verdict of guilty. Judgment. Appeal by defendant. (See *S. v. Bowles,* 7 Jones, 579.)

Attorney-General for the State.
W. F. French and N. McLean for defendant.

SMITH, C. J. On the trial of the issue as to the paternity of the child, the examination of the mother taken before the justice, and charging the defendant to be the father, was read in evidence to the jury.

Thereupon the defendant offered himself as a witness in his own behalf, and denied that he had ever had sexual intercourse with woman.

The mother was then herself examined, and testified that such intercourse had taken place between the defendant and herself, and gave the time and place.

The defendant then proposed to prove in rebuttal of her testi- (440) mony, and to sustain his own, that she lived on terms of intimacy with another man; that they had been seen together in the woods in the daytime, and at night, and on one occasion, about nine months before the birth of the child, occupying the same bed. The evidence, on objection, was ruled out, and defendant excepted.

The defendant further offered to show by the midwife that the child bore a resemblance to this man. The court rejected the testimony, and defendant excepted.

The only question before us is as to the admissibility of the evidence.

The first act on this subject was passed in 1741, and declares that if a woman giving birth to a bastard child "shall on oath accuse any man of being the father of the bastard child, etc., such person so accused *shall be adjudged the reputed father.*"

This act denied all defense to a charge of bastardy made on the oath of the mother. In the year 1814 the act was amended, and the examination of the mother declared to be *prima facie evidence* of the fact. Rev. Stat., ch. 12, sec. 4.

In the construction of the act, thus modified, it was held that to repel the statutory force of the mother's oath the defendant must show affirmatively that *he is not the father* of the child, by proof of nonaccess, impotence, or other natural defect inconsistent with his paternity. *S. v. Patton,* 27 N. C., 180; *S. v. Wilson,* 32 N. C., 131.

This last case was decided at August Term, 1849, and at the next succeeding session of the General Assembly (1850-51) the law was again amended, and it was enacted that upon the trial of the issue of paternity of the child "the examination of the woman as aforesaid, taken and returned to court, shall be presumptive evidence against the person

accused, subject to be rebutted by other testimony which may be introduced by the defendant." Bat, Rev., ch. 9, sec. 4.

(441) At June Term, 1852, this Court was called on to construe the law in its present form, and to decide upon the admissibility of evidence to impeach the veracity of the woman. *S. v. Floyd,* 35 N. C., 382.

The evidence was declared to be competent, and *Nash, J.,* in delivering the opinion and referring to the recent change, says: "Whatever of incongruity or verbiage there may be in the act there can be no doubt of the meaning of the Legislature. They intended to let in evidence on the part of the defendant of a circumstantial character to show he was not the father of the child. Before that act, he was required to *prove that he was not;* now he is permitted to satisfy the jury, if he can, by *any evidence* known to law, that the charge is false. The words of the act are 'subject to be rebutted *by other testimony*'—by what testimony is left at large. The defendant was therefore at liberty to assail the correctness of the evidence, to wit, the examination on the part of the State, by any testimony which had a tendency to show the jury that it was not true, or that they ought not to rely on it."

Ruffin, C. J., in a separate concurring opinion, after referring to the terms *"prima facie"* and *"presumptive"* evidence, and the legislative intention in the change, says: "Keeping that circumstance in mind, and having regard to the construction given to the expression *"prima facie* evidence" in the act of 1814, and also to the fact that it had been held that the woman when offered as a witness on the trial of an issue might be discredited and impeached, though her examination could only be disproved, it would seem sufficiently clear that as evidence the act meant to put the examination before the justice on the same footing with the testimony of the woman in person. Therefore it was competent for the defendant to offer any evidence calculated to impair confidence in the examination."

Concurring in this construction of the statute, we think this case disposes of the question before us.

(442) The defendant swears that he has never had sexual connection with the mother of the child, and to corroborate his own statement, and disprove the charge made against himself, professes to show her criminal intercourse with another man about the time when in the course of nature the child must have been begotten, and that this intercourse had become habitual. The evidence tending to prove this was clearly competent and proper. The judge also erred in rejecting testimony that the child resembled the same man. It was admissible, as was the other, to show that the defendant was not, and another man was, its father.

In *S. v. Woodruff,* 67 N. C., 89, the jury was allowed to look at the child and see if it favored the defendant, with a view to ascertain its paternity, and the Court says: "Where the question is as to the identity of a party, or his resemblance to other persons, the law has very properly adopted a very different rule of common sense and common observation, and *it allows all persons to testify to such identity or to such resemblance* who have had an opportunity of seeing the persons, if but for an instant."

To the same effect is *Warlick v. White,* 76 N. C., 175. The only case to which our attention has been called and which seems to conflict with the views we have expressed is that of *S. v. Bennett,* 75 N. C., 305. In that case it is held that proof of the woman's illicit intercourse with another man nine months before the birth of the child does not rebut the presumption of paternity under the statute, and was properly rejected. If the case be regarded as an authority, it is clearly distinguishable from ours, in the fact that here is the *defendant's own testimony* that he was not, and in the nature of things could not be, the father of the child, and other circumstances are deposed to tending to sustain his oath in opposition to the oath of the woman.

The evidence offered in *S. v. Bennett* was not by itself inconsistent with the imputation of the defendant's paternity, and therefore did not, if true, overcome the presumption. But says the Court: (443) "If the defendant had further proposed to prove that he had had no connection with the woman during the time in which, according to the course of nature, the child must have been begotten, the presumption would have been rebutted." This further proof would have rendered the rejected evidence competent, and is present in our case. The evidence ought to have been received.

PER CURIAM. *Venire de novo.*

Cited: S. v. Parish, 83 N. C., 614; *S. v. Giles,* 103 N. C., 395; *S. v. Perkins,* 117 N. C., 701; *S. v. Warren,* 124 N. C., 809.

STATE v. MATTHEW T. NORRIS.

Commercial Fertilizers—Privilege Tax.

The privilege tax of $500 levied under the provisions of chapter 274, sec. 8, Laws 1876-77, upon manufacturers, etc., of commercial fertilizers, is valid.

MISDEMEANOR under Laws 1876-77, ch. 274, sec. 8, tried at August Term, 1877, of WAKE Criminal Court, before *Strong, J.*

Special Verdict: 1. The defendant sold to one Smith on 25 June, 1877, one bag of commercial fertilizer, known as "Hatchell's Phosphate," at the price of $5, and delivered the same to him in the county of Wake.

2. No license to make such sale had been obtained by the manufacturer of the said fertilizer from the Treasurer of the State, nor had any money been paid for such license.

3. The said fertilizer was manufactured in Baltimore by one Hatchell, and by him sent to the defendant at Raleigh for sale on consignment, and was at the time of said sale in the original package in which
(444) it had been put at the place of manufacture aforesaid.

4. There is in the State of North Carolina but a single manufactory of commercial fertilizers, which annually manufactures and sells in the State fertilizers to the value of $100,000, while fertilizers to the value of $2,000,000 are imported from other States and sold in this State every year.

If upon these facts the court is of opinion that the defendant is guilty, then the jury find him guilty in manner and form as charged in the bill of indictment; if otherwise, then the jury find him not guilty.

His Honor being of opinion upon the facts found in the special verdict that the defendant was guilty, so adjudged, and the defendant appealed.

D. G. Fowle, who prosecuted in the court below, appeared with the Attorney-General for the State.

Gilliam & Gatling for the defendant.

READE, J. "No manipulated guano, superphosphate, or other commercial fertilizer shall be sold or offered for sale in this State until the manufacturer, or person importing the same, shall first obtain license therefor from the Treasurer of the State, for which shall be paid a privilege tax of $500 per annum." Laws 1876-77, ch. 274, sec. 8. The violation of the above is made an indictable misdemeanor.

If we consider of the vast amount of adulterated fertilizers which may be, and which probably are, imposed upon our farmers, and then consider further of other portions of the same act, we may be let into its object.

It is entitled "An act to establish a Department of Agriculture," etc.

Section 9 provides that every bag or package of such fertilizer
(445) offered for sale in this State shall have stamped upon it the name, location, and trade-mark of the manufacturer, and the chemical composition of the contents in detail; and the Department may have it analyzed and condemned if found faulty, and the seller subjected to penalties.

Now, why all this, unless to protect the public from imposition, and to keep the traffic in the hands of responsible persons, and to make the means to that end self-sustaining by a license tax?

But still that statute has to be considered in connection with the following provisions in the Constitution of the United States:

"Congress shall have power to regulate commerce with foreign nations and among the several States." Art. I, sec. 8 (3).

"No State shall levy any imposts or duties on imports or exports." Art. I, sec. 10 (2).

"The citizens of each State shall be entitled to all the immunities and privileges of citizens of the several States." Art. IV, sec. 2 (1).

And if our statute is in conflict with any of those provisions, it must fall.

Those provisions in the United States Constitution have been so often before the Supreme Court of the United States during the last half century, and have been so fully considered in all their bearings, that it would be venturesome in any one to attempt to add any new thoughts upon them, and the learning in regard to them is so familiar to the profession that it would be a useless display to elaborate it. *Brown v. Maryland,* 12 Wheat., 419; *The License Cases,* 5 Howard, 576, 592; *Pierce v. New Hampshire,* 5 Howard, 554; *Woodruff v. Parham,* 8 Wall., 123; *Hinson v. Lott,* 8 Wall., 148.

The two last cases we regard as in point; and being lately (446) decided and reviewing all former decisions, and being by all the judges save one, we regard them as decisive of this case. They establish the doctrine "that the term 'import' as used in that clause of the Constitution which says that no State shall levy any imposts or duties on imports or exports, does not refer to articles imported into one State from another, but only to articles imported from a foreign country into the United States. Hence a uniform tax imposed upon *all* sales made in a State, whether by a citizen of the State or of some other State, and whether the goods sold are the produce of that or of some other State, is valid."

We do not enter into any consideration of the question whether and in what cases Congress may, if it think proper, tax imports into one State from another; or whether and in what cases a State may tax or prohibit importations into its borders from other States, as police regulations in case of morals and health; for that is not our case. The statute under consideration does neither prohibit nor tax importations from other States. On the contrary, it assumes the importations to have been accomplished, and standing upon a footing with the same article made in the State by its own citizens, and in granting the license to sell, makes no discrimination whatever. And the fact that more is

brought into the State than is made within it is an *accident,* and does not affect the main fact.

The clause in the Constitution of the United States, that "the citizens of each State shall be entitled to all the immunities and privileges of citizens of the other States," does not give to citizens of other States coming into this State the immunities and privileges which they may have had at home, nor does it give them greater immunities and privileges here, because they are strangers, than our own citizens have, but only the same, putting all on equal footing. No citizen of this State can make a commercial fertilizer and sell it without the license.

(447) Why, then, should a citizen of another State have a greater privilege?

The tax is valid.

PER CURIAM. Affirmed.

---

(448)

STATE v. SAMUEL RAMSAY.

Indictment—Disturbing a Religious Congregation—Evidence.

1. On the trial of an indictment for disturbing a religious congregation, it was in evidence that the defendant, either just before or shortly after the beginning of the services, rose up in the church and began to speak on matters connected with his expulsion from the church, which had occurred a short time previously; that the minister directed him to stop, when he declared he would be heard, and persisted in speaking until he was removed from the house; that he thereupon reëntered and resumed his speaking, notwithstanding repeated remonstrances from the minister, and by his conduct and voice so interrupted the services that the meeting was broken up: *Held,* that upon this evidence the jury were warranted in returning a verdict of guilty.

2. On such trial, evidence as to "before what body the defendant was tried" was inadmissible; also as to "how members of that church were tried and convicted"; also as to the manner of the defendant's expulsion and its propriety; also as to whether the official board or the members of the church had, under its rules, authority to expel.

3. On such trial, a witness introduced by the State testified on cross-examination that he had "taken the defendant to task for sowing the seeds of discord and spreading false views": *Held,* to be inadmissible to further inquire what those false views were.

4. On such trial, it was admissible for the State to ask a witness "if it was a custom in this church for an expelled member to get up on the Sabbath day, just before or at the beginning of the regular service, and make known his grievances."

5. It is not necessary, to constitute the offense of disturbing a religious congregation, that the congregation should be actually engaged in acts of

religious worship at the time of the disturbance; it is sufficient if they are assembled for the purpose of worship, and are prevented therefrom by the acts of the defendant.

6. Where on such trial the court charged, at the defendant's request, "that the act of disturbance must be wanton, intentional, and contemptuous," but added "that the acts would be wanton if done without regard to consequences, that is, for some purpose of his own, and with intent to do them, whether he thereby disturbed the congregation or not": *Held*, not to be error.

DISTURBING a religious congregation, tried at May Term, 1877, (449) of WAKE Criminal Court, before *Strong, J.*

The case is sufficiently stated by the *Chief Justice* in delivering the opinion of this Court. Verdict of guilty. Judgment. Appeal by defendant.

A. M. Lewis, who prosecuted in the court below, appeared with the Attorney-General for the State.

T. M. Argo for the defendant.

SMITH, C. J. The defendant is charged with the offense of disturbing a religious congregation and obstructing public worship.

It was in evidence that a religious congregation under the ministerial charge of one Edwin Marcom was accustomed to assemble for divine worship at a place known as Piney Grove Church; that on Sunday, 13 May, 1876, the congregation began to assemble, and a number estimated by witnesses at from ten to thirty were in the church and their minister in his place in the pulpit.

Some of the witnesses testified that services had already begun by the singing of a hymn, and others, that the congregation had been engaged in voluntary singing not under the direction of the minister, and that the regular hour for Sabbath services had not arrived.

The defendant, who had been a member of the church and had been, about two weeks before, expelled from its communion, rose up in the church and began to speak on matters connected with his expulsion, when he was told by the minister that he could not be permitted to do so, and must stop; that the defendant declared he would be heard, and persisted in speaking to those present, until some of the members put him out of the house; that he reëntered immediately and (450) resumed his speaking, in disregard of repeated commands and remonstrances from the minister, and by his disorderly conduct and noise so interrupted the exercises that the meeting was broken up and those present left the house and returned home.

Various exceptions were taken by the defendant to the rulings of the court in admitting and rejecting evidence, only so much of which will be stated as is necessary to the exceptions being properly understood.

Exception 1: On the cross-examination of Edwin Marcom, a witness for the State, he stated that the defendant had been a member of his church, but was not then a member, having been turned out about two weeks before. The defendant's counsel proposed further to inquire of the witness, before what body the defendant had been tried. The solicitor objected, and the inquiry was not permitted.

Exception 2: On the cross-examination of Edwin Marcom, a witness for the State, he said he had taken the defendant to task for sowing the seeds of discord and spreading false views. The defendant's counsel asked what these false views were. The solicitor objected, and the answer was disallowed.

Exception 3: The defendant's counsel inquired of one of his own witnesses, how members of that church are tried and sentenced. On objection of the solicitor, the evidence was excluded.

Exception 4: Defendant's counsel proposed to ask of his own witnesses about a conversation between Marcom and the witness in reference to defendant's expulsion from church membership, and its propriety. On objection of the solicitor, the evidence was declared inadmissible.

Exceptions 5 and 6: The solicitor asked a witness if it was a custom in this church for an expelled member to get up on the Sabbath day, just before or at the beginning of the regular service, and make
(451) known his grievances. This question was objected to by defendant's counsel, but allowed to be put and answered.

Exception 7: On the redirect examination of defendant's witness, his counsel inquired if "the official board or the members of the church had under its rules the authority to expel." The question, objected to by the solicitor, was ruled out.

The exception to the evidence elicited in answer to the inquiry whether any usage prevailed in the church which permits an expelled member, on the Sabbath day, at or just before the regular services commence, to discuss his grievances before the congregation, is without just foundation.

The evidence tended to show that the interruption was without pretext or excuse, and that the time and place selected by the defendant to make known his complaints were not only in themselves inopportune and improper, but found no countenance in the practices of the church.

We are of the opinion that these rulings of the court are correct, and that the exceptions are untenable. The evidence offered by the defendant and excluded was altogether irrelevant and calculated to mislead. Whether the defendant was rightfully or wrongfully turned out of the church—whether, because of irregularity in the proceedings, he was still a member of the body, or had ceased to be—were matters foreign to the issue to be tried. Whenever a religious body is wantonly and intentionally disturbed and obstructed in its worship of Almighty God, it is a

misdemeanor, by whomsoever done, and it is no defense that the party committing the act is a member of the congregation disturbed.

The court was right also in not allowing an examination into and a review of the action of the church judiciary, to ascertain if it was regular and right. This is not a subject of inquiry before the court, and the examination was properly arrested.

We propose next to consider the matters of exception to the instructions given to the jury, as to what acts constitute the offense (452) charged against the prisoner.

The court charged the jury that if the congregation were assembled for religious worship, and five or more persons had met and were engaged in acts of devotion by singing and praying, shortly before the usual Sabbath exercises conducted by the minister began, and while waiting for him to begin, and the defendant did the acts of disorder and interruption deposed to by the witness, for the purpose of disturbing the congregation; or if he did those acts without authority according to the custom of the congregation, with intent to make himself heard, regardless of the disturbance thereby made; or if he did the acts mentioned to prevent the regular religious service for which the congregation was then assembling; or without the sanction of usage in the church, with intent to make himself heard, though he might thereby disturb the congregation, and if he did thereby disturb the congregation, he would be guilty of the offense charged.

The defendant's counsel asked the court to charge that to constitute the offense, the congregation must when disturbed be actually engaged in acts of religious worship. The court refused this instruction, but told the jury that if they were assembled for the purpose of worship, and were prevented therefrom by the disturbance, it would be sufficient, as already charged.

The defendant's counsel asked this further instruction: "That the act of disturbance must be wanton, intentional, and contemptuous."

The court so charged, but added, "that the acts would be wanton if done without regard to consequences, that is, for some purpose of his own, and with intent to do them whether he thereby disturbed the congregation or not."

There can be no serious doubt, if the facts assumed in the charge were satisfactorily proved to the jury (and the verdict so declared), that the defendant has been guilty of a misdemeanor. No one (453) has a right to interfere with the religious devotions of others by making known his own grievances, real or fancied, in so boisterous a manner as to disturb and finally break up the meeting altogether, and thus frustrate the object for which it was held; and he cannot be heard to say he did not intend the obvious and necessary consequences of his

conduct. If the act is done intentionally and without excuse, it is a wanton invasion of the rights and privileges guaranteed in section 26 of the Declaration of Rights of the Constitution of the State, and sustained by an enlightened public sentiment.

And we think the protection of the law is extended as well to the congregation when assembled in their house of worship and about to begin the regular exercises, as when it is actually so engaged, and that acts which *prevent* the exercises and break up the meeting so that they cannot be had at all, equally with those which disturb the religious devotions of the assembly after they begin, are prohibited by law. We cannot see any just reason for distinguishing between the two cases. We refer briefly to the few adjudications on the subject in this State to which our attention has been called in the argument. In *S. v. Jasper,* 15 N. C., 323, the Court declares it a misdemeanor to interrupt and disturb a religious meeting "by talking and laughing in a loud voice" and "making ridiculous and indecent actions and grimaces, during the performance of divine service."

So the Court declares it to be an indictable offense to disturb a congregation engaged in public worship, though it be not in a church, chapel, or meeting-house specially set apart for that purpose. *S. v. Swink,* 20 N. C., 358. But it is not a misdemeanor if the disturbance takes place after the religious exercises are over and when the congregation has entered upon secular business. *S. v. Fisher,* 25 N. C., 111. So if
(454) the interruption arises from loud singing by one who is honestly participating in the service and intends no disrespect, it is not punishable by indictment. *S. v. Linkhaw,* 69 N. C., 214.

The principle which underlies the adjudications in this State is obviously the right of every religious body to meet and engage in the worship of God, in the language of our Constitution, "according to the dictates of their own consciences," and to be protected by law in the enjoyment of that right. It can make little difference whether the liberty of public worship is denied by conduct which breaks up and disperses a body met for religious purposes and just about to enter upon its duties; or the congregation is *interrupted* only during its devotions, and not wholly prevented from performing them.

It is not open to dispute whether the acts of the defendant were a disturbance in the sense that subjects him to a criminal prosecution, and that the jury were warranted in so finding, when they had the admitted effect of breaking up the congregation and frustrating altogether the purposes for which it had convened.

PER CURIAM. No error.

Cited: *S. v. Bryson,* 82 N. C., 580; *S. v. Jacobs,* 103 N. C., 401, 403; *S. v. Davis,* 126 N. C., 1061.

(455)

STATE v. W. M. JAMES.

Indictment—False Imprisonment—Constable—Verbal Order of Justice.

1. On the trial of an indictment for false imprisonment, where it appeared that the defendant, who was a constable, had arrested the prosecutor under a warrant issued by a justice of the peace, and under the verbal order of the justice had put him in jail, where he remained until the succeeding day, when he was brought out, and under another warrant regularly committed: It was *held*, that the defendant was properly convicted.

2. A verbal order of a justice of the peace sending a prisoner to jail, whether made before or after the examination on the warrant, is not a sufficient authority for the officer to whom the order is given.

INDICTMENT for false imprisonment, tried at Fall Term, 1877, of McDOWELL, before *Schenck, J.*

Michael Geary, the prosecuting witness, testified that the defendant (a constable) arrested him; that he asked for his authority, but defendant declined to show him any warrant; that he asked for the accuser, but no one was given; that defendant put him in jail and kept him there all night, and that on the next day he was taken out, and an investigation had before J. A. Scott, a justice of the peace.

Scott, the justice, was then introduced by the defendant, and testified that without any written affidavit, but upon verbal information, he issued a warrant charging the said Geary with the offense of bigamy; that the defendant arrested Geary by virtue of this warrant and put him in jail under his (Scott's) verbal order; that there was no trial, no witnesses, and no mittimus; and that Geary remained in jail until the next day, when he was brought out and a regular warrant issued on affidavit, and that he was then regularly committed.

His Honor being of opinion that the imprisonment on the day (456) before the trial was illegal, instructed the jury to render a verdict of guilty, and sentenced the defendant to pay a fine of $50, and the defendant appealed.

Attorney-General for the State.
Busbee & Busbee and J. W. Hinsdale for defendant.

FAIRCLOTH, J. In Bat. Rev., ch. 33, will be found well-nigh our whole statute law in criminal proceedings before a justice of the peace. There is no doubt that any peace officer or private citizen may arrest and detain any person to prevent a breach of the peace, or to suppress any breach of the peace actually taking place in his presence, without any

warrant to do so. And it is equally clear that such officer or private person may, by virtue of his office and duty, lodge his prisoner in the common jail, or resort to other modes of confinement, if the emergency of the occasion requires it; for instance, if an escape is attempted, or a rescue is threatened, or if the prisoner is exposed to violence from a mob, etc. In such like cases it is the duty of the officer to secure his prisoner. These are plain duties, and the authority does not depend on any warrant or order of a judicial officer, but is found in the written and unwritten law of the land. But let it be observed that in all such instances nothing but the necessity of the occasion will protect the officer or individual from the charge of trespass, and consequently of indictment. When, however, the offense is past and a warrant or other proper process is issued and comes to the hands of an officer, and he has made the arrest, he must proceed then according to the import of the warrant. It alone constitutes his authority, and he must observe its mandates strictly. The warrant must (under section 11 of said chapter) command him, as it does in the present case, to arrest the accused forth-
(457) with, and (by section 20) bring him, when no other provision is made, before the justice who issued the warrant, or, if he be absent or from any cause unable to try the case, before the nearest justice in the same county, who shall proceed (section 21) as soon as may be to examine the complaint and the witnesses, etc., and discharge, bail, or commit the prisoner according to law; all of which must be in writing. Section 40.

In the case before us the defendant, under a warrant issued upon information, arrested one Geary "and put him in jail under the *verbal* order" of the justice who issued the warrant, where he remained until next day, when his counsel had him brought out and a regular warrant issued on affidavit, etc. The case states "there was no trial, and no witnesses and no mittimus" when or before he was put in jail by the defendant.

The case is briefly stated, and it does not clearly appear whether the defendant returned his prisoner before the justice as he was commanded to do, or not; and if he did, and the justice for any cause was unable to hear the case, it does not appear that the defendant attempted to carry him before the next nearest justice in the county, but that he put him in jail on said verbal order. Under these circumstances, we agree with his Honor in ruling that the defendant is guilty of the charge of false imprisonment. The record shows nothing on this occasion to justify imprisonment on the ground of necessity for any purpose. It is of course true that after arrest the officer may detain the prisoner until a convenient hour for trial, or for other reasonable cause; for when he has brought him before the justice he is in law still in his custody until a

discharge, or bail is granted, or an actual commitment to jail by a warrant of the justice. We think a verbal order of the justice sending the prisoner to jail is no sufficient authority for the constable, whether made before or after the examination. It fails to satisfy the statute (section 10) if made after, and if made before, it is important (458) that it be in writing, showing the reason for the commitment. It then protects the officer and the jailer, and shows the truth of the matter on a subsequent inquiry by *habeas corpus* or otherwise. We find no direct authority for this position—at least, the authorities are unsatisfactory—but we find early English statutes allowing ministerial officers to commit to jail, but we have none such which have come to our attention. It was held in *S. v. Dean,* 48 N. C., 393, that authority to convey a prisoner to jail cannot be given by a justice of the peace by *parol* to one who was not a regular officer; and in *S. v. Parker,* 75 N. C., 249, it was held that a town constable could not arrest and imprison for a breach of a town ordinance.

PER CURIAM. No error.

Cited: *S. v. Freeman,* 86 N. C., 687.

STATE v. PICKETT.

False Pretense—Sufficiency of Indictment.

An indictment for obtaining goods, etc., under false pretenses must charge not only the false pretense, but must also contain the negative averment that the pretense was actually untrue.

FALSE PRETENSES, tried at August Term, 1877, of NEW HANOVER Criminal Court, before *Meares, J.*

The bill of indictment was as follows: The jurors, etc., present that Joseph Pickett, etc., desiring to purchase a horse of Charles B. Futch, agreed to pay him the sum of $80—$30 cash and the balance he would secure by a mortgage on a mule to which the title was (459) perfectly good, and of which the said Joseph Pickett was the sole and only owner, as he alleged, and also on the horse, etc. And the said Pickett did then and there designedly, unlawfully, and falsely pretend to said Futch that he, said Pickett, was the sole and only owner of said mule, and that there was no lien or other ownership existing thereon, well knowing the same to be false, by color of which said false pretense

he, said Pickett, did then and there obtain of said Futch one horse of the value of, etc., with intent, etc. Verdict of guilty. Motion in arrest overruled. Judgment. Appeal by defendant.

Attorney-General for the State.
A. T. and J. London for defendant.

READE, J. The indictment charges "that the defendant pretended that he was the sole and only owner of said mule, and that there was no lien or other ownership existing thereon." There is certainly no crime in pretending that the mule was his, because it may all be true. But it is also charged that he "designedly, unlawfully, and falsely pretended" it. It is not specified in what the falsehood consisted. Was he not the "sole owner"? Was there some other "ownership" or partnership? Was there some "lien" on it? Or in what else did the falsehood consist?

The precedents are to the effect that the indictment must not only charge that he falsely pretended that the mule was his, but it must contain the negative averment that it was not his. "Whereas in truth and in fact the said Joseph Pickett was not then the owner of said mule," etc., is the form in Archbold's Criminal Pleading. And it is held that the indictment is insufficient without it. *Rex v. Perrett,* 2 M. and W., 379. There is error. This will be certified, to the end that the judgment may be arrested.

PER CURIAM. Reversed.

Cited: S. v. Farmer, 104 N. C., 890; *S. v. Carlson,* 171 N. C., 827.

---

(460)

STATE v. ROBERT MUNDAY.

Indictment—False Pretense—Sale of Land.

An indictment for obtaining goods under false pretenses can be maintained against one who sells and conveys land for a price, by falsely representing it to be free from encumbrances and the title thereto perfect, when the land is in fact encumbered with a mortgage, known to the defendant.

OBTAINING goods under false pretenses, tried at Fall Term, 1877, of WATAUGA, before *Cloud, J.*

The bill of indictment was as follows: The jurors, etc., present, that Robert Munday, etc., unlawfully did falsely pretend to one Joseph Moretz

that he, Munday, was seized in fee and possessed of a certain tract of land lying (describing the land), and that said Munday had a good title to the same free from all encumbrances whatsoever; by means of said false pretense, he, the said Munday, did then and there induce said Moretz to purchase said land, and by means of said false pretense did then and there obtain from said Moretz the sum of $300, with intent then and there to cheat and defraud said Moretz of the same, and did then and there make and execute to said Moretz a deed in fee to said land, with assurances that the title to the same was free from all encumbrances; whereas in truth and in fact the said Munday had made, before the day of said sale and purchase of the land aforesaid, a good and sufficient mortgage on said land to one James Winkler to secure the payment of $100, which said mortgage has been duly admitted to probate and recorded in the office of the register of deeds in the county aforesaid, and constituted, at the time of said sale and purchase by said Moretz, an encumbrance on said land and the title thereto, and (461) does still constitute an encumbrance on said land, to the great damage of him, the said Moretz, to the evil example of all others in like cases offending, against the form of the statute, etc.

After a verdict of guilty was rendered by the jury, the defendant's counsel moved in arrest of judgment. Motion allowed, and Cowles, solicitor for the State, appealed.

Attorney-General for the State.
G. N. Folk for the defendant.

READE, J. A. says to B., Here is a tract of land which belongs to me, and to which I have a perfect title, free from encumbrances; I will sell it to you and make you a perfect title for $300. B. says, I will give it; and he does give it. It turns out that A. had no title, or an encumbered one, and that he knew it at the time, and intended to cheat and defraud B. out of his money; and B. was defrauded. Is that a false pretense indictable in A.? The defendant says it is not, because false pretense is akin to larceny, and that land is not the subject of larceny, and that neither land nor any transaction conveying land is the subject of false pretense; and for this, *S. v. Burrows,* 33 N. C., 477, is cited.

In that case the defendant had by a false pretense induced the prosecutor to convey to him 20 acres of land, and the charge was "to cheat and defraud the prosecutor of 20 acres of land." It was held that to obtain land by false pretense was a *fraud,* but that it was not indictable under the statute, which embraced only such personalties as were the subjects of larceny. How does that affect this case? Here is no charge of obtaining land by a false pretense, but of obtaining *money* by false pretense. And surely money is the subject of larceny.

It is suggested that title to land is often an abstruse question, and that one who is not a lawyer, and indeed one who is, may be inno-
(462) cently mistaken about it, and therefore may be punished for an innocent act. Not at all. A *mistake* is not indictable. A *pretense* is not indictable. A *false pretense* is not indictable. It must be a false pretense with intent to cheat and defraud, and which does cheat and defraud.

We were not favored with an argument for the defendant, and his brief refers only to *S. v. Burrows.* If there is any other alleged defect in the indictment, our attention was not called to it, and we have discovered none, although the indictment is not very well framed.

There is error in the arrest of judgment. This will be certified, to the end that there may be judgment upon the verdict. *S. v. Phifer,* 65 N. C., 321.

PER CURIAM. Reversed.

Cited: S. v. Sherrill, 95 N. C., 666; *S. v. Burke,* 108 N. C., 751.

STATE v. ISAAC H. SMITH.

Indictment—Forgery—Evidence—Testimony of Solicitor.

1. On the trial of an indictment for forgery, charging the defendant with having forged an order for $60.07, evidence that the defendant had forged an order for *any other amount* is not admissible.
2. It is error to permit the solicitor for the State to testify in a criminal trial without being sworn.

FORGERY, tried at Spring Term, 1877, of CRAVEN, before *Moore, J.*

No statement of the facts is necessary to an understanding of the opinion of this Court as delivered by *Mr. Justice Reade.* Verdict of guilty. Judgment. Appeal by defendant.

(463) *Attorney-General for the State.*
M. DeW. Stevenson for the defendant.

READE, J. The indictment charges the defendant with having forged an order for $60.07. There was no evidence tending to show that he had forged an order for that amount, and of course he ought not to have been convicted.

The only evidence introduced related to two orders, one for $60 and the other for $60.27.

Whether these discrepancies between the charge and the proof really appeared on the trial, or whether they are the result of a careless record, we do not know. We are bound by the record.

One of the witnesses for the State, the solicitor, was permitted to testify for the State without being sworn, the defendant objecting. This was error.

PER CURIAM. *Venire de novo.*

(464)

STATE v. ALEXANDER SHAFT.

Hiring Out Convicts—Hiring to Wife.

Under the provisions of chapter 196, Laws 1876-7, the commissioners of a county have the power to hire out a man imprisoned in the county jail upon a conviction for fornication and adultery, to his wife, upon her giving bond with sureties for the price.

SMITH, C. J., dissenting.

MOTION to remand the defendant to jail, heard at Fall Term, 1877, of BUNCOMBE, before *Schenck, J.*

At Spring Term, 1877, of said court the defendant was convicted of fornication and adultery, and sentenced by Judge Furches to imprisonment for six months in the county jail. After the defendant had been in prison about two months, the county commissioners hired him to his wife (under Laws 1876-77, ch. 196), who, with her husband and two sureties, entered into a contract with the commissioners to pay $5 per month for the unexpired term of said imprisonment. The defendant was thereupon released, being required by the contract only to return to the jail at night. Whereupon the solicitor moved to remand him to jail, and his Honor, being of opinion that the effect of the contract was an evasion of the law and a prevention of the *bona fide* execution of the sentence, allowed the motion and ordered the defendant to be imprisoned for the balance of said term. From this order the defendant appealed, and was allowed to give bond for his appearance at the next term of said court.

Attorney-General for the State.
No counsel for the defendant.

RODMAN, J. As this is the first case under chapter 196, Laws 1876-77, we have carefully considered it. The act makes an important change in the treatment of convicts sentenced to imprisonment (465)

in the county jails. It authorizes the county commissioners *or* such other county authorities therein as may be established by law, *and also* the mayor, etc., of cities and towns, under such rules and regulations as they may deem best, to provide for the employment of such convicts on the public streets and highways, on public works, "or other labor for *individuals* or corporations": *Provided,* that they shall not be detained longer than the term for which they are sentenced, and that the sums realized from hiring them out shall be applied to pay the fines and costs.

We need not notice the provisions in the subsequent sections of the act. It will occur at once that the act is not clear as to who shall make the regulations, and says nothing as to what is to be done in case the county commissioners, and the other county authorities, whoever they may be, and the mayor, etc., make different regulations. No question upon that, however, arises in this case, for here the county commissioners alone have acted.

At Spring Term, 1877, of Buncombe the defendant was convicted of fornication and adultery, and sentenced to be imprisoned for six months. After having been in prison for about two months, the county commissioners hired him out to his wife for the remaining four months of his term at $5 per month, requiring (or allowing) him to return to the jail every night. The wife gave what purports to be her bond (which the husband signs also), with two sureties, agreeing to pay the $5 per month, or at that rate for the time that Shaft might work. The proceeding seems to conform to the act, and it is not said to be irregular, except in that he was hired to his wife. On this point it is said that her contract was void. So it was; but her sureties were bound. Again it is said, that to permit the wife of a prisoner to hire him is substantially to allow him to escape punishment. That may sometimes be so; and it may be so even when the person who hires him is not his wife. And, on the other hand, if the master be a harsh one, the service may be a severer punishment than simple imprisonment. But neither the Superior Court nor this Court can annul a hiring by the county commissioners because it is suggested that the master may be or is either too kind or too hard. The selection of the master is confided to the commissioners. The idea of the Attorney-General is, and perhaps that of the judge below was, that the punishment was evaded. But, *considering the nature of the defendant's crime,* it may be that the commissioners ingeniously devised to aggravate the punishment by arming his wife, in addition to the usual and acknowledged powers of a wife *in such cases,* with those of a master paying for his work, and entitled thereby to keep him in sight and hearing. In this view, the permission to return to the jail after sunset and remain until sunrise looks like a

(466)

merciful alleviation of what would otherwise have been a cruel and unusual punishment.

The actual effect of the act in the present case may be taken to be to commute imprisonment into the payment of $20, if the costs amount to so much. The Legislature may certainly do this if it thinks proper, and in many cases where the offense is petty, the propriety of doing so would be generally conceded. But it will be as generally conceded that there are cases in which the only adequate punishment is actual imprisonment. *"In arcta et salva custodia."* The Legislature may see fit to amend the law by leaving it to the judge to say in his sentence whether the prisoner may be hired out or not, or by allowing the hiring only when the prisoner shall be in prison for nonpayment of a fine.

We think that the judge erred in undertaking to annul the action of the county commissioners, and his order to that effect must be reversed.

SMITH, C. J., dissenting: Not being able to concur with the (467) other members of the Court in their construction of the act of 6 March, 1877, as applicable to the facts of this case, I propose briefly to state the reasons for dissent.

This first section of the act authorizes county commissioners and the mayor and intendant of cities and towns in the State to provide, "under such rules and regulations as they may deem best for the employment on the public streets, public highways and public works, or other labor for individuals or corporations, of all persons imprisoned in the county jails of their respective counties, cities, and towns, upon conviction of any crime or misdemeanor, or who may be committed to jail for failure to enter into bond for keeping the peace, or for good behavior, *and who fails to pay the costs* which he is adjudged to pay, or to give good and sufficient security therefor." It further requires the moneys realized "from the hiring out of such persons" to be applied to the "fine and costs in cases of conviction." The third section declares "that the party in whose service such convicts may be, may use the necessary means to hold and keep them in custody and to prevent their escape."

The object of the act is not so much to substitute outdoor remunerative labor in place of close confinement as a preferable mode of punishment, as it is to provide for the fine and costs of prosecution, and relieve the public treasury of a burden. It allows only a hiring out for such period within the limits of the sentence as will raise the necessary amount. A different construction would confer upon these officers a discretionary power by which the authority to punish by imprisonment, vested in the courts, could be entirely neutralized and its exercise defeated. It is obvious this effect was never intended by the General Assembly, and their purpose was only to make the labor a subsidiary

(468) punishment so far as was necessary to pay these charges. When such hiring takes place, the legal relation of master and servant, with enlarged powers to the former, is created between the hirer and the person hired, with the right of personal control over the latter. It cannot be supposed that the act contemplated such relation between the wife and the imprisoned husband, nor are any persons embraced in its general terms except such as can legally enter into the contract by which the relation is formed.

There are, in my opinion, insuperable obstacles to a construction which extends the provisions of the act to the case before us:

1. The wife, by reason of the coverture, has no capacity to enter into a contract with the public authorities by which the relation is created. She cannot assume the personal obligations, and consequently cannot be invested with the powers involved in the relation. Nor is the difficulty obviated by the bond with sureties, because the rights conferred over the convict are personal to the wife, and she must be capable of exercising them. The bond is a security merely for enforcing the contract.

2. The effect of such hiring of the prisoner to his wife would be to subvert the marital relation and the principle upon which domestic harmony is secured, and tend to introduce an irrepressible conflict.

3. It is forbidden by public policy, and inconsistent with the peace and good order of society.

For these and other reasons, the act should not be interpreted to embrace the case before us, but its general terms should be understood as confined to persons who can lawfully enter into the contract, and take and exercise the authority it gives. The judge therefore, in my opinion, was right in treating the transaction as evasive of the law and null, and in ordering the prisoner to serve out the unexpired residue of his term.

PER CURIAM. Reversed.

Cited: *S. v. Sneed,* 94 N. C., 808.

---

(469)

STATE v. JAMES KEESLER.

Indictment—Incest.

Incest is not an indictable offense in this State.

INDICTMENT for incest, tried at Fall Term, 1877, of CHEROKEE, before *Furches, J.*

The defendant was charged with having had an improper intercourse with his own daughter, and was found guilty by the jury, and upon motion of the defendant's counsel, his Honor arrested the judgment upon the ground that the bill of indictment did not charge a criminal offense, and Tate, solicitor for the State, appealed.

Attorney-General for the State.
No counsel for the defendant.

BYNUM, J. The defendant is indicted for incest. This offense was not indictable at common law, and as we have no statute in this State declaring it to be a criminal offense, this indictment cannot be maintained. It is related that in the time of the commonwealth in England, when the ruling powers found it for their interest to put on the semblance of extraordinary strictness and purity of morals, incest and willful adultery were made capital crimes; but at the restoration, when men from the abhorrence of the hypocrisy of the late times fell into a contrary extreme of licentiousness, it was not thought proper to renew the law of such unfashionable rigor; and these offenses have been ever since left to the feeble coercion of the Spiritual Court according to the canon law. 4 Bl., 64; 2 Tomlin L. D., 160; Bish. Stat. Cr., secs. 725, 728; Bish. Mar. and Div., secs. 313, 315.

In most of the States of the Union incest is made an indictable (470) offense by statute. Perhaps its rare occurrence in this State has caused the revolting crime to pass unnoticed by the Legislature.

PER CURIAM. Affirmed.

Cited: S. v. Laurence, 95 N. C., 660; *S. v. Cutshall,* 109 N. C., 774.

NOTE.—This was cured by chapter 16, Laws 1879, now Revisal, 3351, 3352.

STATE v. WILLIAM PATTERSON.

Indictment—Larceny—Evidence.

On the trial of an indictment for larceny, it was in evidence that lint cotton was stolen from certain bales on the platform of a warehouse; that on the night of the larceny four bags containing cotton like that stolen were found near-by, two of them hidden; that the defendant on the same night was seen near the warehouse, behind some wood; that about one month afterwards two bags (containing lint cotton like that stolen), similar in all respects to the bags found near the warehouse, were found concealed in defendant's possession: *Held,* that there was sufficient evidence to warrant a verdict of guilty by the jury.

STATE *v.* PATTERSON.

LARCENY, tried at January Special Term, 1878, of NORTHAMPTON, before *McKoy, J.*

The defendant was indicted in two counts, one for larceny of, and the other for felonious receiving, 40 pounds of lint cotton, the property of the Seaboard and Roanoke Railroad Company.

On the trial the State introduced witnesses who testified to the following facts: On the night of 22 December, 1877, lint cotton was
(471) taken from certain bales of cotton in possession of the company for transportation, while on the platform of the company's warehouse. On the same night four guano bags filled with lint cotton, and bearing the mark "W. C. G. and Special Compound," were found, two of them hidden under a freight car that stood on a turn-out near-by, and two others on the track of the road. The defendant was seen the same night behind some cordwood near the place, and was also recognized by his voice.

On 18 January following, by the defendant's direction, some seed cotton was removed from a crib in his possession and about one mile distant from the warehouse, and while being removed two guano bags of lint cotton were discovered hidden under the seed cotton. The cotton in these bags, as well as the bags themselves and the marks on them, corresponded with those found near the warehouse on 22 December, as stated.

The defendant insisted that there was no evidence to go to the jury on which they were warranted in finding the defendant guilty of either charge. The objection was overruled, the evidence submitted to the jury, and a verdict of guilty rendered. Judgment. Appeal by defendant.

Attorney-General for the State.
S. J. Wright for the defendant.

SMITH, C. J., after stating the facts as above: The only question arising on the record for us to consider is, Was there any evidence of the larceny, or of the felonious receiving, which warranted the conviction of the defendant?

If there was no evidence, or if the evidence was so slight as not reasonably to warrant the inference of the defendant's guilt, or furnish more than material for a mere suspicion, it was error to leave the issue to be passed on by the jury, and they should have been directed to acquit.

Cobb v. Fogleman, 23 N. C., 440; *S. v. Williams,* 47 N. C., 194.
(472) If, however, there was evidence proper to be submitted to the jury, the jury alone must weigh and determine its credibility and sufficiency to establish the fact in dispute. It is of the highest importance in the administration of the law, alike in civil and criminal trials,

that the respective and well marked functions of the judge and jury be kept separate and distinct, and in their exercise neither one be allowed to interfere with the other.

The question now presented is this, Do the facts proved, if believed by the jury, reasonably warrant the inference deduced from them of the defendant's guilt? We are of the opinion that the evidence was properly left to the jury, and that it is not so defective as to authorize the Court on that account to disturb the verdict. It was proved that lint cotton was stolen from some bales on the platform of the company's warehouse on the night of 22 December, and four bags containing cotton like that taken from the bales were found near the place, some on the track and some hidden under a freight car. The defendant was there at the time, and was seen behind a pile of wood. About a month afterwards two bags, in all respects similar to the other four and with the same marks upon them, filled with the same sort of cotton, were found concealed in a crib in possession of the defendant, under some seed cotton, about a mile from the warehouse; and, so far as appears to us, no explanation is given by the defendant.

It was not, in our opinion, an unreasonable conclusion of the jury that the cotton discovered in the defendant's crib was part of that stolen from the bales; and if so, that it was stolen by the defendant. If the identity of the cotton be conceded, the fact of its being found in his crib covered up and concealed under other cotton, with the other concurring evidence, tends strongly to establish the truth of the charge. The possession of stolen property recently after the theft, and under circumstances excluding the intervening agency of others, affords presumptive evidence that the person in possession is himself the thief, and (473) the evidence is stronger or weaker, as the possession is nearer to or more distant from the time of the commission of the offense. *S. v. Jones,* 20 N. C., 122; *S. v. Johnson,* 60 N. C., 151. And such evidence must be left to the jury to weigh and consider in determining the question of the defendant's guilt. *S. v. Lytle,* 27 N. C., 58; *S. v. Williams,* 47 N. C., 194; *S. v. Shaw,* 49 N. C., 440.

In *S. v. Kent,* 65 N. C., 311, the facts of which were not unlike those of our case, *Reade, J.,* referring to the exception taken that the bacon found was not sufficiently identified as the bacon stolen, says: "There was, however, evidence that the bacon found was the bacon stolen. The prosecutrix testified that her bacon was unsmoked and had a yellow mould on it. The bacon found was unsmoked and had a yellow mould on it, and she believes it was hers. And the defendant pointed out the place where the bacon was found and spoke of it as hers."

The evidence in the case was properly left to the jury, and of its sufficiency to prove to their satisfaction the guilt of the defendant, they

alone must determine. The judge who tried the cause had power to set aside the verdict if in his opinion injustice was done to the defendant. He has not thought proper to do so, and we cannot disturb the verdict.

PER CURIAM. No error.

Cited: *S. v. Waller,* 80 N. C., 402; *S. v. Matthews, ib.,* 424; *Brown v. Kinsey,* 81 N. C., 250; *R. R. v. Morrison,* 82 N. C., 145; *Codner v. Bizzell, ib.,* 393; *S. v. Bryson, ib.,* 579; *S. v. Bryson,* 82 N. C., 579; *S. v. Rice,* 83 N. C., 663; *S. v. James,* 90 N. C., 705; *S. v. Atkinson,* 93 N. C., 523; *S. v. McBryde,* 97 N. C., 396; *S. v. Turner,* 119 N. C., 848; *S. v. McRae,* 120 N. C., 609; *S. v. Gragg,* 122 N. C., 1091.

(474)

STATE v. JAMES NEEDHAM.

Indictment—Larceny—Evidence—Confessions.

On a trial for larceny, the court below ruled out certain confessions of the defendant offered in evidence by the State, which had been made on the preliminary trial before a justice of the peace, because the defendant had not been put on his guard as required by law; the State then offered in evidence certain other confessions made voluntarily by the defendant shortly after the trial before the justice without the offering of inducements or threats, which evidence the court below admitted: *Held,* not to be error.

LARCENY, tried at Fall Term, 1877, of RANDOLPH, before *Buxton, J.* The defendant was charged with stealing a horse, and upon the trial his Honor admitted evidence of confessions made by the defendant under the circumstances embodied in the opinion of this Court delivered by the *Chief Justice.* Verdict of guilty. Judgment. Appeal by defendant.

Attorney-General for the State.
No counsel for the defendant.

SMITH, C. J. The indictment against the prisoner contains two counts: one charging the larceny of a horse, the other, the felonious receiving. The jury rendered a verdict of guilty of larceny.

The only point made on the trial and on the record presented for review is as to the admissibility of certain confessions of the prisoner allowed to be proved before the jury. It appears that on the preliminary examination before the justice of the peace, the prisoner was asked if he was guilty of the charge, and in reply, he made statements tend-

ing to criminate himself. These statements, on objection of (475) prisoner's counsel, were excluded by the court, upon the ground that he had not been instructed and put on his guard as required by law. Bat. Rev., ch. 33, secs. 22, 23. A witness present at the examination testified that he heard no inducements held out to the prisoner to confess. Another witness testified to two interviews with the prisoner—one, on Sunday night after the examination, and the other, at his (prisoner's) request on Monday morning following; at both of which certain confessions were made which the State proposed to prove. The witness swore that no inducements were offered, nor threats made, and that the prisoner made the confessions freely and of his own accord. The evidence was objected to, upon the ground that the prisoner had already implicated himself before the justice, and it was to be presumed that the same influence which prompted the confession there made, and ruled out by the court, continued to operate on his mind; and that to render the evidence competent, it must be shown that he had been previously informed that the statements he had made before the justice could not be used against him, and the influence that induced them thus removed.

The court ruled that the declarations made before the justice were incompetent, not because they were not voluntary, but that they had been received in disregard of the requirements of the statute; and allowed the confessions made to the witness to be given in evidence to the jury. To this the prisoner excepts; and the sole question before us is as to the admission of the evidence.

The Court is of opinion that the evidence was properly received. The confession was proved to be voluntary, and made without the exercise of any influence appealing either to the hopes or fears of the prisoner. This is not a case falling under the rule, that a confession shown to have proceeded from an improper influence is not only itself incompetent, but all subsequent confessions which are presumed to flow (476) from the same source are equally so, and these will not be received until it is made to appear that the vitiating influence has ceased to act upon the prisoner's mind. *S. v. Gregory,* 50 N. C., 315; *S. v. Scates, ibid.,* 420. Here, there is no evidence of the exercise of undue influence over the prisoner at any time to induce him to confess, and the statement to the justice was not rejected on that ground, but because the provisions of the statute were not observed. "A free and voluntary confession," said *Eure, J.,* "is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt." 1 Greenl. Ev., sec. 219. And even if the confession is made by one in custody, it being his own unbiased act, may be proved. *S. v. Jefferson,* 28 N. C., 305. The court acted right in admitting the evidence.

PER CURIAM. No error.

(477)

STATE v. ANTHONY MEACHAM.

Indictment—Larceny—Evidence—Judge's Charge.

On a trial for larceny, where the defendant who was charged with stealing a hog contended that certain pork found in his house was part of a hog of his own, and two of his children testified that the defendant had killed a hog of his own the day before the pork was found, it was error for the court to instruct the jury "that there was no evidence that the hog was the property of any one except the prosecutor."

LARCENY, tried at Fall Term, 1877, of RICHMOND, before *Seymour, J.*

The defendant was charged with stealing a hog, and that part of the case bearing upon the point decided by this Court is as follows: "The defendant contended that the pork (which was found in defendant's house by virtue of a search warrant obtained by the prosecutor) was part of a hog of his own, and introduced two of his children who testified that he had killed a hog of his own the day before." His Honor charged the jury that they must be satisfied that the pork found in defendant's possession was stolen, that defendant was connected with the stealing, and that the stolen hog was the one lost by the prosecutor. After retiring, the jury came into court for further instructions; and one of the jury stated that they had agreed upon the two first points, but that one of them doubted whether the hog was proved to be the property of the prosecutor. In reply, his Honor stated that the question was one of fact which they must determine, and after recapitulating the evidence, added: "And there is no evidence that the hog was the property of any one except the prosecutor." To this last remark the defendant excepted. Verdict of guilty. Judgment. Appeal by defendant.

(478) *Attorney-General for the State.*
No counsel for the defendant.

READE, J. Fresh pork, cut up and unsalted, being found in the house of defendant, and the question being whether it was his own meat or whether he had stolen the hog out of which it was made, and there being no evidence tending to show that he had stolen the hog out of which it was made, the defendant introduced two members of his family who swore that the defendant had killed one of his own hogs for pork the day before. His Honor instructed the jury that there was *no evidence* that the meat found was the meat of the defendant. In this there was error.

PER CURIAM. *Venire de novo.*

STATE v. HIRAM JENKINS.

Indictment—Larceny.

In an indictment for the larceny of certain meat belonging to a railroad company, the property was laid in a depot agent of the company, who had possession and control of it for the company for the use of its hands: *Held*, that the indictment is defective. The property should have been laid in the railroad company, the agent in such case not being a bailee.

SMITH, C. J., and RODMAN, J., dissenting.

LARCENY, tried at Fall Term, 1877, of BURKE, before *Schenck, J.*

The defendant was charged with stealing meat, and the property was laid in W. B. McDowell, the depot agent, at Morganton, of the Western North Carolina Railroad Company. After the testimony was closed the defendant's counsel asked the court to charge the jury that the indictment could not be sustained, because the ownership of the (479) property was in the railroad, and not in the agent. This was declined, and the defendant excepted. Verdict of guilty. Judgment. Appeal by defendant.

Attorney-General for the State.
A. C. Avery and G. N. Folk for the defendant.

READE, J. The only question which it is necessary to consider is, whether the property in the goods stolen is properly laid in the indictment.

It is settled by all text-writers, and it is familiar learning, that the property must be laid to be either in him who has the *general* property or in him who has a *special* property. It must at all events be laid to be in some one who has a *property* of some kind in the article stolen. It is not sufficient to charge it to be the property of one who is a mere servant, although he may have had the actual possession at the time of the larceny, because, having no *property,* his possession is the possession of his master. These are the only general principles that can be laid down, and any given case must be governed by them.

In this case the meat stolen belonged to the railroad, and was in its possession in its depot house, for the purpose of feeding its hands. The property is not laid to be in the railroad, but in its depot agent, who had nothing to do with it and did nothing with it except to give it out to the railroad hands to eat. His testimony was that he was "the agent at the depot and had possession and control *for them,* as their (480) bailee, of the bacon alleged to have been stolen by defendant; that on Friday evening he issued rations of bacon to the railroad hands, and

in the hogshead where the bacon was, he left one and a half sides of bacon loose; and that he locked the depot and took the key," etc.

It is true, he says he was their bailee; but what is a bailment is a question of law, and the facts which he states do not make him a bailee. A bailee has a special property in the thing bailed. He does not pretend that he had any property in it, or that he held it for any use of his own. He states expressly that he was the railroad's agent and had possession and control of the meat *"for them."* It was in their house, for their use, to feed hands, and was issued to their hands by their agent or servant. The agent himself might have committed larceny of the bacon, which could not have been the case if he had been the bailee.

It has been decided in this Court that one who gets staves on my land on shares may steal them before they are divided. So an overseer who is to have a part of the crop for his wages. So with a cropper. So with a clerk in a store. So with a servant or agent of any kind who has no *property* in the thing stolen, although he may have the possession. It is otherwise if he has a property, general or special. A. is the general owner of a horse; B. is the special owner, having hired or borrowed it, or taken it to keep for a time; C. grooms it and keeps the stable and the key, but is a mere servant and has no property at all. If the horse be stolen, the property may be laid to be either in A. or B., but not in C., although he had the actual possession and the key in his pocket.

Why was not the property laid in the railroad? Then there could have been no difficulty. Or there might have been two counts, if (481) there was any uncertainty.

PER CURIAM. *Venire de novo.*

Cited: S. v. Patrick, 79 N. C., 656; *S. v. Allen,* 103 N. C., 434; *S. v. Carter,* 113 N. C., 641.

STATE v. FOARD KRIDER AND OTHERS.

Indictment—Larceny—Fish—Defective Indictment.

1. Fish are not the subject of larceny unless reclaimed, confined, or dead, and valuable for food or otherwise.
2. An indictment for larceny which charges the defendant with having stolen "five fish," and fails to allege any of the conditions which render fish the subject of larceny, is fatally defective.
3. In an indictment against two defendants it is improper to examine each defendant against the other before the grand jury for the purpose of obtaining a true bill against both.

STATE *v.* KRIDER.

LARCENY, tried at Fall Term, 1877, at DAVIE, before *Cox, J.*

The defendants were charged with stealing fish. The jurors, etc., present, that (defendants), etc., five fish of the value, etc., of the goods, etc., then and there being found, did feloniously steal, take, and carry away, against, etc. The names of both defendants were indorsed on the bill of indictment as witnesses, one against the other, and it was insisted by the counsel for defendants that to make codefendants witnesses against each other before the grand jury was not warranted. No objection was made in the court below as to the sufficiency of the bill, but the point was taken on the argument here. Verdict of guilty. Judgment. Appeal by defendants.

Attorney-General for the State. (482)
J. M. Clement and W. H. Bagley for the defendants.

FAIRCLOTH, J. The defendants were indicted and convicted for stealing "five fish," of the goods, etc. Wild animals are not the subject of larceny, unless reclaimed, confined, or dead, and are valuable for food or otherwise. *S. v. House,* 65 N. C., 315.

Fish are the subject of larceny only under the same conditions as animals, and the bill of indictment is fatally defective in failing to allege any of those conditions, and no amount of proof can supply the defect.

All the books agree that if fish are confined in a tank or otherwise, so that they may be taken at the pleasure of him who has thus appropriated them, then they are the subject of larceny. "Fish confined in a net or tank are sufficiently secured; but how, in a pond, is a question of doubt, which seems to admit of different answers, as the circumstances of particular cases differ." 2 Bish. Cr. L., sec. 685; 1 Hale P. C., 511; Foster's Crown Law, 366.

An English statute, 5 Geo. III., ch. 14, made it indictable to steal fish from a river, in any inclosed park. In a case under this statute, "where the defendant had taken fish in a river that ran through an inclosed park, but it appeared that no means had been taken to keep the fish within that part of the river that ran through the park, but that they could pass down or up the river, beyond the limits of the park, at their pleasure, the judges held that this was not a case within the statute." *Rex v. Corrodice,* 2 Russell, 1199. This is sufficient for our case; but it appears from the record that there are two defendants, and that a true bill was obtained by examining each one before the grand jury against the other. We will call the attention of solicitors and the profession to the question whether there is any authority for such practice. At present we are aware of none. It probably arose from a loose construction of the act of 1866, on the law of evidence. It is ob- (483)

jectionable, and in the absence of positive statutory enactment cannot be permitted.

Let this be certified, to the end that judgment be arrested.

PER CURIAM. Reversed.

Cited: S. v. Patrick, 79 N. C., 656; *S. v. Bragg,* 86 N. C., 691; *S. v. Crumpler,* 88 N. C., 650; *S. v. Frizell,* 111 N. C., 723; *S. v. Coates,* 130 N. C., 703; *S. v. Burton,* 138 N. C., 577.

NOTE.—See Laws 1883, ch. 137, sec. 5, now Revisal, 2478.

(484)

STATE v. JOHN R. CAVENESS.

Indictment—Larceny—Trial—Evidence—Judge's Charge—Argument of Counsel—Receiving Stolen Goods.

1. It is not permissible for a witness, introduced to impeach another witness, to be asked concerning him, "From his general character in the neighborhood, would you believe him on oath?"

2. A judge in his charge to a jury is not required to recapitulate collateral evidence testified to on the trial.

3. It is too late after verdict to except to the omission of the court to recapitulate to the jury any evidence adduced on the trial.

4. This Court will not undertake to supervise the discretionary powers of the court below over the argument of counsel, unless it clearly appears that such discretion has been abused.

5. Where on the trial of an indictment for larceny the counsel for the State below argued to the jury "that at some time or other, possibly one of them might be compelled to have a suit for property upon which he relied for subsistence, and the person with whom he was in litigation might seize and detain it, as the defendant had done in this case; that they must remember that at some time one of them might be placed in the circumstances of the prosecutrix, and as they would expect justice themselves, so they must mete it out to the prosecutrix," when he was stopped by the court: *Held,* not to be error. The court could hardly have done less, and was not required to do more.

6. An exception to improper remarks made by counsel in argument to a jury should specify *what was said;* otherwise, this Court cannot see that any prejudice resulted from the irregularity.

7. On a trial for larceny the counsel for the State in his argument to the jury said, "that if the judge had believed that the defendant had made out a fair claim to the property, he would have directed a verdict of

acquittal without their leaving the box; but as he had not done so, the judge must not have believed that a fair claim to the property had been shown by the defendant." This passed unnoticed by the judge then, and in his charge. When the jury returned with a verdict of guilty, and on being polled three of them did not concur, the judge informed them "that he had no opinion of his own, and that it was improper for the counsel so to have represented him": *Held* to be error. The remarks of the counsel were improper, and the attempted correction of them by the court came too late.

8. On the trial of an indictment for larceny, containing a count for receiving, etc., the court charged the jury, at the request of the defendant, "that if they believed that the defendant, although he may not have taken the property himself, but, finding it at his house, detained it under a claim of right, he cannot be convicted on the second count," but added "that such claim must be a *bona fide* claim, that is, a claim made in good faith, a claim believed in by himself, and not a mere sham claim or pretense of a claim": *Held*, not to be error.

9. To render a defendant guilty of receiving stolen property, etc., he must know at the moment of receiving it that it has been stolen, and he must at the same time receive it with felonious intent.

LARCENY, with a count for receiving, etc., tried at Fall Term, 1877, of RANDOLPH, before *Buxton, J.*

The defendant was charged with stealing a horse and mule, the property of Mary E. Bray, or receiving the same knowing them to have been stolen. The exceptions taken upon the trial are embodied in the opinion of this Court, delivered by *Mr. Justice Bynum.* Verdict of guilty. Judgment. Appeal by defendant.

A. W. Tourgee and J. T. Morehead, who prosecuted in the court below, appeared with the Attorney-General for the State.

J. N. Staples for the defendant.

BYNUM, J. This case is before us on the appeal of the defendant from the refusal of the court below to give him a new trial for alleged errors, which we will specify and dispose of in their order.

First exception: The character of the prosecuting witness was (486) impeached by the defendant. A witness examined for that purpose testified that he was acquainted with the general character of Mary E. Bray, and that it was bad. He was then asked the question, "From her general character in the neighborhood, would you believe her on oath?" The answer was objected to by the State, and ruled out by the court. In that ruling there was no error. This question of practice has been settled in this State for over twenty years, and, as settled, has been acted upon by the profession uniformly ever since the decision of the Court in *Hooper v. Moore,* 48 N. C., 428. We are aware that there are conflicting decisions in other States and countries upon the admissibility

of such a question and answer, but we adhere to our own decisions as being founded on the better reason, and because *it is* the decision of our own Court.

Second exception: That while the judge in his charge to the jury recapitulated all the circumstances relied on by the State, he omitted several of the most important relied on by the defendant.

These several facts which were omitted by the judge are enumerated in the exception, and of them it is only necessary to remark, that they all are collateral to the main issues on trial, and that the case states that they were fully commented on in the argument. The court permitted the parties to raise immaterial issues, and as a consequence to take a wide range in the introduction of collateral testimony. But for finding a bill of indictment in the record, it would be difficult to gather from it that a person had been on trial for larceny and receiving stolen goods. As tried, it was essentially a civil action to try the title to a mule and colt, in which the case was made principally to turn upon side issues, to wit, the adultery and fraudulent bankruptcy of the defendant. The judge was therefore right in passing by all evidence not strictly relevant, (487) as only calculated to distract and mislead, and in directing the minds of the jury to the evidence material to the true issues. This we think he did fairly and with sufficient fullness. It is preposterous to expect a judge in summing up to repeat all the evidence adduced in a prolonged trial. The law gives general directions only, as to the manner and substance of his charge, necessarily leaving to him a large discretion in the particulars of it, the exercise of which must depend upon and be governed by the exigencies of each particular case. That this discretion may not be abused, it is the right and duty of counsel, before or during the charge and before the jury shall be sent out to consider of their verdict, to ask for such instructions to the jury, both as to evidence improperly omitted and that which has been stated correctly, and to declare and explain the law arising thereon. Fairness to the judge, as well as the due and orderly administration of justice, requires that his attention should be called to all errors and omissions in stating the evidence, before it is too late to correct them—that is, before the jury retire from the box, and certainly before the verdict is returned. The exception we are considering was not made until after the rendition of the verdict. The exception came too late, unless it can be made clear to this Court that the error or omission amounted to an error in law. Nothing of the kind appears here. It unfortunately occurs frequently, and perhaps it occurred in this case, that counsel do not discover the shortcomings of the judge until the verdict comes in—against them. This exception is overruled. *S. v. Moses,* 13 N. C., 452; *Simpson v. Blount,* 14

N. C., 34; *S. v. Scott,* 19 N. C., 35; *S. v. Haney,* 19 N. C., 390; *Boykin v. Perry,* 49 N. C., 325.

Third and fourth exceptions: The defendant had conveyed the land on which she lived to the prosecutrix, and in her examination she was allowed to testify that the conveyance was made before he went into bankruptcy. The prosecution, under objection, was then allowed to ask the prosecutrix if the defendant's indebtedness to her was any part of the consideration of the deed, and she answered that it was (488) not. It does not appear at whose instance the evidence as to the conveyance of the land was brought out, but as it was wholly immaterial, and was not objected to, it was not error to allow the witness to explain the whole transaction. And so the argument, founded on that evidence, though it might properly have been arrested by the court, was a matter within its discretion to allow or disallow, under all the circumstances of the case. This Court will not undertake to supervise that discretionary power, unless it clearly appears to have been abused, and to the prejudice of the defendant. It does not so appear.

Fifth exception: The counsel for the State used this argument to the jury: "That at some time or other, possibly one of them might be compelled to have a suit for property upon which he relied for subsistence, and the person with whom he was in litigation might seize and detain it, as the defendant had done in this case; that they must remember that at some time one of them might be placed in the circumstances of the prosecutrix, and as they would expect justice themselves, so they must mete it out to the prosecutrix." The judge here stopped the counsel, and told him he must not appeal to the fears or prejudices of the jury. The judge could hardly have done less, and we think he was not required to do more. The rebuke was well timed and sufficient. The State, properly represented, never asks that one of her citizens shall be either convicted of a high crime or imperiled in his trial by appeals to the passions and selfish private interest of the jurors. Her prosecutions are placed upon higher grounds; the evidence should be legal and pertinent, fairly and impartially stated to the jury, and the deductions and argument therefrom legitimate and candid.

Sixth exception: One Alfred Caveness was sworn as a witness for the defendant, but not examined by him, and was tendered to the State. The State's counsel proposed this question: "Upon a (489) trial at Ashboro some time ago, in which the defendant was a party and Mary Bray, the prosecutrix, a witness, did you not hear the defendant prove her to be a woman of good character?" The question was excluded and the witness stood aside and not further examined. In his argument to the jury the State's counsel "adverted to the question

propounded, the proposed proof and the objection thereto by the defendant." Upon objection to such comments by the defendant, the prosecuting counsel desisted, and the judge neither then interfered nor did he correct or allude to it in his charge. When the witness was made to stand aside for the reason assigned, it was for all the purposes of the trial as if he had never been introduced; and any allusion to the fact for the purpose of drawing inferences unfavorable to the defendant was altogether improper; and if it had appeared that in fact such unfavorable deductions had been drawn and impressed upon the jury, without any interference or correction by the judge when his attention had been called to it, it would have constituted error. But unfortunately for the defendant, the exception does not specify *what was said by the State's counsel,* so that this Court can see that he was prejudiced by the irregularity. That is always necessary.

Seventh exception: In the argument to the jury, the counsel for the State said: "That if the judge had believed that the defendant had made out a fair claim to the property, his Honor would have directed a verdict of acquittal without their leaving the box; but as he had not done so, the judge must not have believed that a fair claim of property had been shown by the defendant." This passed unnoticed by the judge then, and in his charge to the jury. But when the jury returned with a verdict of guilty, and on being polled, three of the number did not concur, the judge then for the first time informed the jury "that he had no
(490) opinion of his own, and that it was improper for the counsel so to have represented him."

This came too late. The remarks of the State's counsel were improper; they conveyed a false belief to the minds of the jury and were calculated to mislead only. They were spoken in the presence of the presiding judge, and not being corrected by him, they came to the jury with the impress of his assent and approbation. With such false convictions upon their minds, the jury retired and made up their verdict.

The judge admits his error by his subsequent attempt to correct it, but it was too late to afford any well grounded assurance that the case of the defendant had not been prejudiced thereby. To permit the verdict to stand, under such circumstances, would be to throw suspicion and distrust upon the impartial administration of justice by jury trial. *S. v. Johnson,* 23 N. C., 354; *Powell v. R. R.,* 68 N. C., 395; *S. v. Dick,* 60 N. C., 516.

Eighth exception: The counsel of the defendant asked the court to instruct the jury: "That if they believe that the defendant, although he may not have taken the property himself, but finding it at his house, detained it under a claim of right, he cannot be convicted on the second

count in the bill." This instruction was given with the qualification added, "that such claim must be a *bona fide* claim, that is, a claim made in good faith, a claim believed in by himself, and not a mere sham claim, or pretense of a claim." As the defendant was acquitted upon the first count, for stealing, it is not necessary to allude to the instructions asked for or given upon that count, or to the last exception, which is substantially included in the one set out. We think the instruction upon the count for receiving was substantially correct and that the explanatory addition thereto, made by his Honor, did not materially change the instruction as prayed for.

A more serious question is, whether it was not the duty of the (491) court to have instructed the jury that there was no evidence to convict the defendant upon the second count. Assuming that all the material evidence is set out in the case, the sum of it is, touching the second count, that the property was stolen one night and found next morning in defendant's stable. That he was not then at home, and, in point of fact, was in another county, 40 miles distant, and did not return until the second day after the occurrence. He certainly did not *receive* the property until his return, as there is no evidence of previous guilty knowledge or connivance. To be guilty he must have known at the moment of receiving it that it had been stolen, and he must at that time have also received it with a felonious intent. There is no evidence that he had any knowledge then imparted to him of the circumstances under which the property was found upon his premises, communicating to him notice of the felony; and his subsequent open and notorious user, and both previous and subsequent claim of the property as his own, are inconsistent with felonious intent at the time of receiving, which is necessary to constitute guilt upon the second count.

As, however, the evidence is not fully stated, and neither the attention of the court nor counsel seems to have been directed to this infirmity in the case, we do not rest our decision granting a new trial upon this point, but upon the error of the court in respect of exception 7.

PER CURIAM. *Venire de novo.*

Cited: S. v. Braswell, 82 N. C., 694; *S. v. Grady,* 83 N. C., 647; *Burton v. R. R.,* 84 N. C., 198; *S. v. Nicholson,* 85 N. C., 549; *Davis v. Blevins,* 125 N. C., 435; *Puett v. R. R.,* 141 N. C., 335; *S. v. Cook,* 162 N. C., 588.

(492)

STATE v. J. C. PARISH.

Indictment—Larceny—Evidence—Confessions.

On a trial for larceny, it was in evidence that the defendant had been charged in his neighborhood with being a common thief, and that notice had been given for a neighborhood meeting "to consult as to what should be done with him about his stealing so much"; that prior to the meeting the defendant went to one of the neighbors engaged in the movement and denied that he had anything to do with the stealing which had been going on; that on the day of the meeting the neighbors assembled and sent word to the defendant that if he would leave the State they would not interrupt him, and two days thereafter he left; that after a few months he returned, and in a few hours after his arrival the same neighbors who took part in the first meeting had again assembled; that upon being asked by the prosecutor, "Are you not ashamed to try to break up an old man as I am, by stealing his sheep and hogs?" the defendant replied, hanging down his head: "The first two hogs you lost, I did not get": *Held*, that the confession of the defendant was not admissible in evidence.

SMITH, C. J., and RODMAN, J., dissenting.

LARCENY, tried at August Term, 1877, of WAKE Criminal Court, before *Strong, J.*

The defendant was charged with stealing a sheep, the property of John Young, who was introduced by the State for the purpose of proving certain confessions made by the defendant. The witness stated, on the preliminary examination, that about two months before the time the confessions were alleged to have been made, and after the time the sheep was alleged to have been stolen, the defendant had left the State; that the confessions were made on the morning of his return and at his father-in-law's; he was not under arrest, and no promises or threats had been made to him; the witness and other persons had been sent for, but
(493) nothing was said as to the purpose for which they had come together; the defendant's father-in-law stated that he (defendant) got back that morning; witness stated that the confessions were made as soon as he got there, and that he "went straight for him" (defendant), and that he heard no one else speak to defendant before the confessions were made. The defendant objected to the evidence as to the confessions upon the ground of undue influence; the objection was overruled, and the witness testified that he said to defendant, "Are you not ashamed to try to break up as old a man as I am by stealing his sheep and hogs?" The defendant sat a second, looking down, and said, "The first two hogs you lost, I did not get." It was also in evidence that the defendant left

the State on Monday; that on the Saturday before, there had been a meeting of the citizens of the neighborhood at which a dozen or more were present, to consult as to what was to be done with the defendant "about his stealing so much," and they concluded if he would leave the State and never return, they would not "interrupt him," on account of the respect they had for his wife and children and for the family of his father-in-law. Thereupon the defendant's counsel again asked the court to exclude the confessions previously admitted,which his Honor declined, and the defendant excepted. It is unnecessary to set out the testimony of other witnesses, as it does not bear upon the point decided in this Court. Verdict of guilty. Judgment. Appeal by defendant.

W. H. Pace and D. G. Fowle, who prosecuted in the court below, appeared with the Attorney-General for the State.

A. M. Lewis and T. M. Argo for the defendant.

READE, J. The confessions of a defendant are admissible when they were voluntary, and inadmissible when they were not. But how can we look into the defendant's heart and see how it was? We have to look at the circumstances of each case and at human nature as we (494) know it to be, and judge what is reasonable about it.

The defendant was charged in his neighborhood with being a common thief. Notice had been given for a neighborhood meeting. They were to meet on Saturday. Before Saturday came the defendant went to one of the neighbors who was engaged in the movement and talked to him about it, and denied that he had had anything to do with the stealing which had been going on. The neighbor told him he would let him know about it next week. On Saturday the neighbors met, a dozen or more, "to consult as to what was to be done with the defendant about his stealing so much"—to use the language of the witness—"and they concluded that if he would leave the State and never return, they would not interrupt him." And they asked one of their number to tell him of it. And on Monday following the defendant fled, leaving his wife and children.

Now, what did the defendant have a right to apprehend from that public meeting? Not a prosecution, because that was not the way to set it on foot. And besides, it was not for one or any particular stealing, but for "stealing so much." They had adjudged him to be a common thief, out of the reach of the law, and they meant to deal with him under a law of their own. He would have known what to expect if prosecuted in court —conviction and punishment if guilty, or acquittal if innocent. But they had already convicted him by common consent of "stealing so much," and the punishment which they meant to inflict was not prescribed in any book. And nothing is so terrific to brute or man as the

mad pursuit by his own kind. If he had not left on Monday, and the neighbors had met again and arrested him, or "interrupted him," as their language was, would any one suppose he was in a condition for voluntary action? He would have known that it would do him no good to deny it, because before the meeting he had gone to one of them
(495) and denied it; and yet after that they determined that he must leave, or be "interrupted," whatever that might mean.

The condition upon which he was not to be "interrupted" was, that he was to leave and "never return." But after an absence of a few months he did return to his father-in-law's, getting there before day, and in a few hours, early in the morning, his father-in-law had gathered a number of those same neighbors, and he found himself in their power.

Now, from what we know of human nature, what are we to assume was the state of his mind? Suppose him to be innocent, what would have been his apprehension? "They told me if I did not leave and never return they would mob me. I have returned, and there they are to mob me. I tried denying my guilt, and that did no good. It may be that if I will not irritate them by further denial, I may appease them by confession." And therefore when the prosecutor "went for him"—a cant phrase by which we understand, fiercely accosted him with the inquiry, "Are you not ashamed to try to break up an old man as I am by stealing his sheep and hogs?" the defendant "sat a second hanging down his head and said, 'The first two hogs you lost, I did not get.'" The confession itself shows the state of his mind. It was neither a confession nor a denial. He was afraid to do either. "Which way I turn is death."

We are of the opinion that the confession ought not to have been admitted.

PER CURIAM. *Venire de novo.*

---

(496)

STATE v. CLARK LILES.

Indictment—Larceny of Growing Figs—Statutory Indictment—Sufficiency of.

1. An indictment under Bat. Rev., ch. 32, sec. 20, for the larceny of figs remaining ungathered in a certain field, etc., which fails to allege that they were "cultivated for food or market," is fatally defective.

2. In an indictment under a statute, where the words of the statute are descriptive of the offense, the indictment should follow the language and expressly charge the described offense, so as to bring it within all the material words of the statute.

STATE *v.* LILES.

LARCENY, tried at Fall Term, 1877, of ANSON, before *Seymour, J.*

The defendant was indicted for stealing figs under Bat. Rev., ch. 32, sec. 20, and the evidence was that the figs grew upon a tree in a field used by the prosecutor for the cultivation of cotton, and that he was in the habit of using them in his family. The tree was not otherwise cultivated than by the cultivation of the field for cotton. The defendant's counsel requested the court to charge the jury that under these circumstances the defendant was not guilty. This was refused, and under the instructions given there was a verdict of guilty. Judgment. Appeal by defendant.

Attorney-General for the State.
T. S. Ashe and Battle & Mordecai for the defendant.

BYNUM, J. The defendant was tried on a bill of indictment of which the following is a copy: "The jurors for the State, upon their oath present, that Clark Liles, late, etc., on the first day of, etc., with force and arms, etc., one gallon of figs of the value of sixpence, the property of Thomas P. Dabbs, then and there standing and remaining ungathered in a certain field of the said Thomas P. Dabbs there situate, feloniously did steal, take and carry away, against the form of the (497) statute," etc.

The indictment is founded on Bat. Rev., ch. 32, sec. 20, which is as follows: "If any person shall steal or feloniously take or carry away any Indian corn, wheat, rice, or other grain, or any cotton, tobacco, potatoes, peanuts, pulse, or any fruit, vegetable, or other product cultivated for food or market, growing, standing, or remaining ungathered in any field or ground, he shall be deemed guilty of larceny and punished accordingly." The words of the statute, "cultivated for food or market," are omitted in the indictment, and the question is whether that omission is fatal to the indictment on a motion in arrest of judgment. We think it is. The offense charged is not one indictable at common law, but is made so by statute only. Such statutes are strictly construed, and are never so construed as to make any act indictable which is not clearly made so by the statute. Figs are not named in the statute as the subject of larceny, and of course are not so, unless by *construction* they are included in the words of the statute, "or any fruit, vegetable, or other product." What kind of fruit, vegetable, or other product is meant? The words of the statute immediately following plainly show, to wit, those "cultivated for food or market." So the indictment omits the words of the statute constituting the main ingredient of the offense. Unless the figs are cultivated for food or market they are not the subject of larceny, and an indictment which omits this averment charges no statutory crime and is fatally

defective. Proof will not supply the omission in the indictment. Figs are sometimes cultivated, and so are blackberries, but not always. But it was never intended by this statute to make blackberries growing in fence corners or persimmons on a tree standing in an abandoned old field the subject of larceny. Figs sometimes grow in waste places and without cultivation. Even in the present case, if the indictment had
(498) been sufficient, the proof would not have sustained it, for although it was in evidence that the figs were used for food, it was also in proof that they were not cultivated. Whether it is necessary in an indictment for stealing corn, wheat, cotton, and other products specifically named in the statute, to aver that they were "cultivated for food or market" it is unnecessary to decide. Figs are not named. It is sufficient to say that it is a well settled general rule that in an indictment for an offense created by statute, it is sufficient to describe the offense in the words of the statute. Where the words of a statute are descriptive of the offense, the indictment should follow the language and expressly charge the described offense on the defendant, so as to bring it within all the material words of the statute. Otherwise it would be defective. Nothing can be taken by intendment. Whart. Am. Cr. Law, sec. 364; Bishop on Stat. Crimes, sec. 425.

There is error.

PER CURIAM. Judgment arrested.

Cited: S. v. Bragg, 86 N. C., 691; *S. v. Merritt,* 89 N. C., 507; *S. v. Deal,* 92 N. C., 803; *S. v. McIntosh, ib.,* 796; *S. v. Stewart,* 93 N. C., 539; *S. v. George, ib.,* 570; *S. v. Ballard,* 97 N. C., 447; *S. v. Whiteacre,* 98 N. C., 755; *S. v. Howe,* 100 N. C., 451; *S. v. Watkins,* 101 N. C., 705; *S. v. Burton,* 138 N. C., 577; *S. v. Beck,* 141 N. C., 831; *S. v. Connor,* 142 N. C., 702.

(499)

STATE v. CLARK LINDSEY AND MILES WILLIAMS.

Indictment—Larceny—Practice—Discretionary Power as to Continuance, Separate Trial and Removal of Cause—Evidence.

1. No appeal lies from the refusal of the court below to continue a cause. (Whether, if the discretion of the judge was *plainly abused* an appeal would lie, *Quære.*)

2. A motion by two or more defendants in an indictment for separate trials is within the discretion of the judge, and his action is not subject to review; so, also, is a motion to remove the cause to another county.

3. Where on a trial for larceny a witness for the State was permitted to testify that in consequence of statements made to him by the defendant, he and defendant went to a certain place in the woods, where defendant pointed out to him the stolen property: *Held*, not to be error.

LARCENY, tried at Fall Term, 1877, of ANSON, before *Seymour, J.*

The exceptions of the defendants and the facts necessary to an understanding of the case are sufficiently stated by *Mr. Justice Rodman* in delivering the opinion of this Court. Verdict of guilty. Judgment. Appeal by the defendants.

Attorney-General for the State.

T. S. Ashe and Battle & Mordecai for the defendants.

RODMAN, J. The prisoners were indicted for larceny in stealing a hog.

1. They moved the court to continue the case, upon an affidavit of the absence of a witness, by whom they expected to prove an *alibi*. The judge refused the motion on the ground that there were other witnesses present to prove the same facts. It has been often said, and (500) it is obviously true, that no appeal will lie from an order continuing a cause, not only because such an order must necessarily be to some extent in the discretion of the judge, but also because it would be impossible to reverse it beneficially. An order refusing a continuance, and requiring a party asking for it to try, seems to stand upon a somewhat different footing, as it may be beneficially reversed. The judgment given upon the trial may be final, and cases may readily be conceived which if improbable are not impossible, when a refusal to postpone a trial would be a manifest and flagrant injustice and oppression, which it would discredit the courts to avow an inability to redress. Nevertheless, the doctrine in this State and in many others seems to be that a refusal to continue a case cannot be assigned as error, any more than a continuance. *S. v. Duncan,* 28 N. C., 98; *Com. v. Donovan,* 99 Mass., 425.

In some of the States, however, it is held that where a refusal to continue is a manifest injustice and wrong, it may be reviewed on appeal. *Bryce v. Ross,* 49 Ga., 89; *Brooks v. Howard,* 30 Tex., 278. In all, it is agreed that such an order is to some extent discretionary, and that even though it be matter of *legal* as distinguished from *arbitrary* discretion, and so capable of review, it will not be reversed unless it appears that the discretion has been plainly abused. It is unnecessary for us to say that in *no* case will this Court review a refusal of a judge below to continue a case, for even if such right of review exists in any case, it does not appear in this case that the discretion of the judge was in any wise abused. The exception on this ground is not sustained.

2. The defendants then moved for separate trials, which the judge refused. We think this was a matter of discretion of the same (501) nature with a refusal to continue, and the same observations apply to it. Exception not sustained.

3. The defendant Lindsey then filed an affidavit for a removal of the case as to him to another county, on the ground that for certain reasons he could not have a fair trial in Anson County. It is unnecessary to state the reasons assigned, because this also was matter of discretion with the judge of a similar nature to those above mentioned, and this Court could not review the exercise of the discretion—at least, unless it appeared to have been plainly abused, which does not appear here. *S. v. Hill,* 72 N. C., 345; *S. v. Hall,* 73 N. C., 134. Exception not sustained.

4. "On the trial of the case the State offered in evidence a confession of the defendant Lindsey. The defendant's counsel objected to this, and offered to introduce evidence tending to show that the confession was obtained by duress. The State proposed to show that the defendant Lindsey stated that the article alleged to have been stolen was concealed in the woods in a certain place, and that he (Lindsey) went with the State's witness to the place and pointed out the stolen property. The court held that the question of duress was immaterial, and admitted the evidence, *limiting it, however, to a statement of the fact deposed to by the witness, that in consequence of statements made to him by the defendant, he, the witness, and the defendant went to a certain tree in the woods, and the defendant there pointed out to him the stolen property.* The defendant excepted. Similar evidence as regards the other part of the property alleged to have been stolen was offered (and received) with regard to the other defendant, Williams."

The question made by these exceptions is the same in principle as that decided in *S. v. Graham,* 74 N. C., 646. In that case the defendant was arrested for larceny in stealing growing corn, and was required by the officer having him in charge to put his foot in a track found in the earth near where the corn had been taken. The Court held that (502) whether the officer had a right to compel the prisoner to put his foot in the track or not (which it was unnecessary to decide), the result of the comparison so made was competent evidence. The correspondence between the prisoner's shoe and the impression in the ground was a fact which could not be affected by any inducements or force used to the prisoner, and which tended to prove his guilt, and it was therefore fit for the consideration of the jury. The Court in its opinion referred to the very question now presented, as an illustration of the principle governing the case then under consideration, as one settled beyond con-

troversy by authorities which are generally supposed sufficient to support any legal doctrine, especially one which is so agreeable to reason and common sense as the one in question appears to us to be.

To the decided cases there cited, numerous others may be added. The rule is plainly stated in the accepted text-books on evidence, and so far as is known to me (and I suppose, because he has not referred to any work questioning it, so far as is known to the counsel for the defendant), has never been questioned in any text-book, or by any court. Gr. Ev. (12 Ed.), sec. 231: "The object of all the care which, as we have now seen, is taken to exclude confessions which were not voluntary is to exclude testimony not probably true. But where *in consequence of the information obtained from the prisoner,* the property stolen or the instrument of the crime or the bloody clothes of the person murdered *or any other material fact is discovered,* it is competent to show that such discovery was made conformably to the information given by the prisoner. . . . It is competent, therefore, to inquire whether the prisoner stated that the thing would be found by searching a particular place, and to prove that it was accordingly so found; but it would not be competent to inquire whether he confessed that he had con- (503) cealed it there. This limitation of the rule," etc.

Section 232: "If the prisoner himself produce the goods stolen and delivers them up to the prosecutor, notwithstanding it may appear that this was done upon inducements to confess held out by the latter, there seems no reason to reject the declarations of the prisoner contemporaneous with the act of delivery, and explanatory of its character and design, though they may amount to a confession of guilt," etc.

To the same effect is 1 Phil. Ev., 411, and 2 Stark. Ev. If any one desires still further to pursue the investigation, I refer him, in addition to the cases referred to in *S. v. Graham,* and to those cited by Greenleaf, to the following: *Jane v. Commonwealth,* 2 Metc. (Ky.), 30; *Mountain v. State,* 40 Ala., 344; *People v. Noy Yen,* 34 Cal., 176; *McGlothlin v. State,* 2 Cold., 223; *Commonwealth v. Knapp,* 9 Pick., 496.

To state the circumstances of these cases or to quote from the opinions of the courts would be an unnecessary consumption of time, in support of the principle that I think must have been long since regarded by every lawyer as definitely established. This exception is not sustained.

PER CURIAM. No error.

Cited: Grant v. Rees, 82 N. C., 74; *McCurry v. McCurry, ib.,* 298; *Gay v. Brookshire, ib.,* 411; *S. v. Drake, ib.,* 596; *Long v. Gooch,* 86 N. C., 710; *Kendall v. Briley, ib.,* 58; *Carson v. Dellinger,* 90 N. C., 232; *Jaffray v. Bear,* 98 N. C., 59; *Allison v. Whittier,* 101 N. C., 495;

Banks v. Mfg. Co., 108 N. C., 283; *S. v. Winston*, 116 N. C., 992; *Edwards v. Phifer*, 120 N. C., 407; *S. v. Blackley*, 138 N. C., 625; *S. v. Dewey*, 139 N. C., 560; *S. v. Thompson*, 161 N. C., 242; *S. v. Burney*, 162 N. C., 614; *S. v. English*, 164 N. C., 506; *S. v. Lowry*, 170 N. C., 733.

(504)

STATE v. RANSOM JAYNES.

Indictment—Malicious Burning—Judge's Charge—Alibi—Evidence—Sufficiency of Indictment.

1. On the trial of an indictment for maliciously burning a mill with intent, etc. (under chapter 228, Laws 1874-5), where the court charged the jury, at defendant's request, "that if the defendant burnt the mill with intent to prevent detection of the alleged embezzlement or theft, although he knew incidental injury would be occasioned thereby, the jury should acquit," but added, "that the State was not bound to prove malice or any facts or circumstances besides the unlawful burning, from which the jury might presume malice, and the defendant might negative the same by evidence either of the State's witness or his own": *Held*, not to be error, although the instruction asked ought to have been refused, there being no evidence that he burned the mill with intent to prevent the detection of the embezzlement, etc.

2. In such case the court charged that it was "essential to the successful proof of an *alibi* that it should cover the whole time of the transaction in question, and where it fails to do so, it is regarded as the most suspicious evidence; that the witnesses all testify to having retired by 10 o'clock, and it was for the jury to say whether the prisoner might have left or did leave his bed, commit the deed, and return before the alarm of fire was given": *Held*, that the first portion of the charge was erroneous, but the error was cured by the subsequent qualification, that "it was for the jury to say whether," etc.

3. On such trial *parol* evidence is admissible to prove the ownership of the property burned.

4. In an indictment under chapter 228, Laws 1874-5, it is sufficient to describe the property burned as "one mill."

INDICTMENT for burning a mill, removed from Rowan and tried at Fall Term, 1877, of DAVIDSON, before *Cox, J.*

The defendant was indicted as follows: The jurors, etc., present that Ransom Jaynes, etc., feloniously, unlawfully and maliciously did set fire to and burn one mill, etc., the property of John C. Ford and John Lindsay, with intent thereby to injure, etc. (See Laws, 1874-5, (505) ch. 228.)

There was no evidence of express malice, but there was evidence tending to show that the defendant, who was in the employment of the prosecutor as a miller, had been stealing grain and flour from the mill, and that he had been informed before the burning that he was suspected of the same. His Honor was requested to instruct the jury that if defendant burnt the mill with intent to prevent detection of the alleged embezzlement or theft, although he knew incidental injury would be occasioned thereby, the jury should acquit. This was given with the addition that the State was not bound to prove malice or any facts or circumstances besides the unlawful burning, from which the jury might presume malice, and the defendant might negative the same by evidence either of the State's witnesses or his own.

It was also in evidence that the mill was burned on the night of 24 April, 1876, and the defendant relying on an *alibi,* introduced witnesses who testified that they were with the defendant on that night at his house, and that he and they retired between 8 and 9 o'clock and were aroused by an alarm of fire about 12 o'clock. They ran immediately to the mill, about 250 yards distant, and found it nearly consumed. As to this defense, his Honor charged the jury as stated in paragraph 2 of the opinion of this Court. He also admitted parol evidence to prove the title to the property, and the defendant excepted. Verdict of guilty. Motion in arrest of judgment. Motion denied. Judgment. Appeal by defendant.

Attorney-General for the State.
W. H. Bailey for defendant.

BYNUM, J. 1. There was no evidence that the prisoner burned (506) or caused the mill to be burned with the intent to prevent the detection of his alleged embezzlement or theft. His Honor then might well have refused to give the instructions asked upon this point. But he did give instructions upon the hypothesis that such evidence had been offered, and though they ought to have been refused, we think they were substantially correct as given.

2. The court charged the jury that it was "essential to the successful proof of an *alibi* that it should cover the whole time of the transaction in question, and when it fails to do so it is regarded as the most suspicious of evidence; that the witnesses all testified to having retired by 10 o'clock; and it was for the jury to say whether the prisoner might have left, or did leave his bed, commit the deed, and return before the alarm of fire was given." The first part of this charge would have been erroneous, but for the correction and qualification subsequently added. It is not "essential to the successful proof of an *alibi,* it should cover the whole

time of the occurrence." Whether it covers the whole, or a part only, the effect of the evidence is a matter for the jury, and they may give it the weight *they* may think it entitled to. The evidence was competent and therefore admissible, and it was an invasion of the province of the jury to tell them that unless the proof covered the whole time of the transaction it lacked the essential element of successful proof. The burden of proving an *alibi* did not rest upon the prisoner. The burden remained upon the State to satisfy the jury upon the whole evidence of the guilt of the prisoner. It was only necessary for the prisoner in his defense to produce such an amount of testimony, whether by evidence tending to show an *alibi* or otherwise, as to produce in the minds of the jury a reasonable doubt of his guilt. But we think the subsequent part of the charge immediately following had the effect of curing the error of
(507) the first part, by presenting to the jury the true way of passing upon the evidence of the *alibi,* to wit: "that it was for the jury to say whether the prisoner might have left, or did leave his bed, commit the deed, and return before the alarm of fire was given." And in giving this instruction it was not improper to add those usual cautions which are necessary in dealing with this kind of evidence, which is regarded with suspicion unless it should cover the whole time of the transaction. Such evidence for the State, if believed, makes out a clear case of guilt; though doubtless there may be cases where it is the only evidence in the power of the defendant to give, and where justice can be vindicated only by introducing it. But under even such circumstances it should be closely scrutinized because of its liability to abuse.

3. The court admitted parol evidence of the ownership of the mill. This was proper. The title was not in issue, and if it had been, proof of possession was *prima facie* evidence of title and sufficient. *S. v. Roseman,* 66 N. C., 634.

4. A motion in arrest of judgment was made for the insufficiency of the indictment. The charge in the bill is that the prisoner "feloniously, unlawfully, and maliciously did set fire to and burn one mill there situate," etc. It is insisted that the indictment fails to describe the kind of mill, so as to show that it was such a mill as the law has taken under its protection. The indictment is framed upon chapter 228, Laws 1874-75, so much of which as is necessary to our case is in the following words: "Whoever shall unlawfully and maliciously set fire to any church, chapel, or meeting-house, or shall unlawfully and maliciously set fire to any house, stable, coach-house, outhouse, warehouse, shop, *mill* or granary, . . . shall be guilty of felony," etc. The indictment, it is seen, pursues the words of the act, which the authorities inform us is generally the safest and best way of charging a statutory offense. It is un-

reasonable to suppose that the act had reference to any other than (508) mills constructed for manufacturing purposes. This is evident from its association in the act with other property of the highest value, such as warehouses, granaries, churches, chapels, and meeting-houses. But this act must be taken in connection with the other statute laws of the State *in pari materia,* and by reference to Bat. Rev., ch. 72, title, "Mills," it will be found that the several kinds of mills are designated, and regulations are prescribed for their use and government. Grist-mills are among those named, and are declared to be public mills. The act in question was clearly intended to protect grist-mills, which the evidence discloses this to have been. We think no one could be misled as to the offense charged.

PER CURIAM. No error.

Cited: S. v. Phifer, 90 N. C., 723; *S. v. Starnes,* 94 N. C., 980; *S. v. Daniel,* 121 N. C., 576, 577; *S. v Sprouse,* 150 N. C., 861; *S. v. Rochelle,* 156 N. C., 642.

(509)

STATE v. THOMAS P. BOWMAN.

Indictment—Murder—Evidence—Expert.

1. The opinion of an expert, warranted only by assuming the truthfulness and accuracy of what has been testified to by witnesses, is not admissible.
2. Such evidence is competent only when founded on facts within the personal knowledge or observation of the expert, or upon the hypothesis of the finding of the jury.
3. Where, on a trial for murder, a physician who stated that he had heard the statements of the witnesses as to the circumstances immediately preceding the illness of the deceased, the appearance of the body immediately after death, the condition of the limbs, etc., and could therefrom form an opinion as to the cause of death, was permitted to testify what in his opinion was the cause of the death of the deceased: *Held,* to be error.

MURDER, removed from Rockingham and tried at December Special Term, 1877, of GUILFORD, before *Buxton, J.*

That portion of the case which constitutes the basis of the decision of this Court is sufficiently set out in the opinion delivered by the *Chief Justice.* Verdict of guilty. Appeal by the defendant.

Attorney-General and Boyd & Reid for the State.
J. T. Morehead and J. E. Boyd for the defendant.

SMITH, C. J. The prisoner is charged with the crime of murder in administering poison to his wife, and upon the trial was found guilty. Judgment of death was pronounced, from which he appealed to this Court.

The case presented for our review contains a full and minute account of the trial, the evidence adduced for the State, the exceptions taken for the prisoner, and the rulings of the court during its progress.
(510) The prisoner offered no evidence. The exceptions are numerous and were elaborately argued upon the hearing before us by the Attorney-General and the counsel for the prisoner, and their researches and citation of authorities would have greatly lessened our labors had we been called on to investigate the various questions discussed. But we are relieved of the necessity of doing this by the view which we take of the case.

Many witnesses were examined and testified to the circumstances attending the death of the deceased, the symptoms developed during the last moments of life and immediately after its extinction, the declaration of the deceased that she was poisoned, the two disinterments and examinations of the body, the discovery of strychnine in some of the internal organs in a chemical analysis of their contents made by Professor Redd, a witness in the cause, the tests resorted to by him to ascertain and prove the nature and efficacy of the poison, and other facts relied on to establish the prisoner's guilt. Three physicians were present during the trial and heard the evidence and were examined as experts. The same questions were propounded to each, the same objections interposed by prisoner's counsel and overruled, and substantially the same testimony given by all, and it is therefore only necessary to consider the exception to the evidence of one of them.

Dr. R. H. Gregory, introduced as an expert, testified as follows: "I have practiced medicine twenty years, actively employed. I have heard the evidence of Mrs. Bowman's death. I have heard the symptoms described by the witnesses, and I have heard the examination of Professor Redd, as to his finding strychnine in the body, and I am prepared to give an opinion as to the cause of her death."

On the part of the State the following questions were then propounded, which, with the answers, were objected to by the prisoner, but allowed by the court:
(511) 1. "Have you heard the statements of the witnesses as to the circumstances immediately preceding her being taken sick, the appearance of the body immediately after death, its appearance subsequent and before interment, the condition of her limbs and members, the account given by the accused of her manner of death, her asking to have

her feet uncrossed, and the manner in which she gripped him and her child, and have you heard the testimony of Mr. Redd as to his analysis and its results, and from them can you as a physician form an opinion as to the cause of her death?" The witness answered, "Yes."

2. "In giving answer, do you exclude from your consideration the evidence of other circumstances in the nature of moral evidence in the case?" The witness answered, "I do."

3. "What in your opinion was the cause of her death?" The witness answered, "I believe it was strychnine."

The prisoner excepts to this course of examination and to the action of the court in permitting the opinion of the witness to be given to the jury. The correctness of this ruling is presented for our review, and after a careful and deliberate consideration we have come to the conclusion that the evidence ought not to have been received.

The opinions of those who are skilled in any department of art or science, resting upon undisputed facts and within the scope of their special calling, are not only competent to be heard by the jury, but often greatly assist in the formation of a correct judgment upon matters they are called on to investigate. The superior knowledge of the expert is frequently required in the conduct of judicial examination of subjects beyond the reach of common observation. But this evidence has its restrictions, and must never be allowed to invade the rightful and exclusive province of the jury in drawing their own conclusions from the testimony of the credibility of which they alone must judge. It is their duty to hear and pass upon the evidence, and the expert's opinion is admitted only to aid in performing that duty. It is (512) obviously improper for any one, expert or nonexpert, to express an opinion, warranted only by assuming the truthfulness and accuracy of what witnesses have testified. Such evidence is competent only when founded on facts within the personal knowledge and observation of the expert, or upon the hypothesis of the finding of the jury. The testimony given against the prisoner in support of the charge contained in the indictment was not admitted to be true, and the presiding judge begins his charge to the jury by reminding them "that the death of the deceased is about the only fact conceded in the case."

It is true that trials have occurred where the defense of insanity was relied on, and medical men have been permitted to express an absolute opinion, resting entirely upon testimony there given in, and it was in consequence of the acquittal of David McNaughton, charged with the murder of one Drummond, in an English Criminal Court in the year 1843, that public attention was directed to the subject, and the opinions of the judges obtained in answer to an inquiry of the House of

Lords, which may be regarded as a definite and final settlement of the law. One of the questions submitted to the judges was in these words: "Can a medical man conversant with the disease of insanity, who never saw the prisoner previous to the trial, but who was present during the whole trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime; or his opinion whether the prisoner was conscious, at the time of doing the act, that he was acting contrary to law; or whether he was acting under any and what delusion at the time?"

To this question *Chief Justice Tindall* on behalf of the judges replied: "We think the medical man under the circumstances supposed cannot in strictness be asked his opinion in the terms above stated, be-
(513) cause each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide, and the questions are not mere questions upon the matter of science, in which case such evidence is admissible. But where the facts are admitted or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right." *Regina v. Higginson,* 47 E. C. L., 129, note a.

The proper mode of examination of experts is thus declared by *Chief Justice Shaw:* "Where the medical or other professional witnesses have attended the whole trial and heard the testimony of the other witnesses as to the facts and circumstances of the case, they are not to judge of the credit of the witnesses, or of the truth of the facts testified to by others. It is for the jury to decide whether such facts are satisfactorily proved, and the proper question to be put to the professional witness is this, If the symptoms and indications testified to by the other witnesses are proved, *and if the jury are satisfied of the truth of them, whether, in his opinion, the party was insane,* and what was the nature and character of that insanity, what state of mind did they indicate, and what he would expect to be the conduct of such person in any supposed circumstances." *Commonwealth v. Rogers,* 7 Merc. (Mass.), 500.

The same learned judge in another case before him uses this language: "We think the question put to Dr. Williams, as an expert, asking his opinion whether, having heard the evidence, he was or was not of the opinion that the testator was of sound mind, was not admissible in that form," and that the proper way to interrogate the expert is, "*If certain facts assumed by the question to be established* by the evidence should be found true by the jury, *what would be his opinion* upon the facts thus found true, on the question of soundness of mind."
(514) *Woodbury v. Obear,* 7 Gray (Mass.), 467.

Mr. Justice Curtis thus lays down the rule: "It is not the province of an expert to draw inferences of fact from the evidence, but simply to *declare his opinion upon a known or hypothetical state of facts.*" *United States v. McGlue,* 1 Curtis, 1. To the like effect is *Heald v. Thing,* 45 Maine, 392; and the elementary writers generally concur in this view of the law. 1 Gr. Ev., sec. 440; Redfield Wills, 40; 1 Whar. Ev., sec. 452; Whar. Cr. Law, sec. 50f.

It is unnecessary to pursue the discussion further, or to cite additional authorities in support of a rule resting upon sound reason, and commending itself to our entire approval. Although the cases referred to involved an inquiry into the state of mind of the party, and to determine his capacity to do a testamentary act, or his responsibility for an alleged criminal act, the principle is equally applicable to medical opinions as to the physical effects of poisonous substances introduced into the human system, and the indications of their presence.

The rule was, in our opinion, violated in permitting Dr. Gregory to give to the jury his opinion of the cause of death of the deceased, without those salutary restrictions which this kind of evidence requires. It is not for us to attempt to measure or to speculate upon the influence which the opinion of an intelligent physician, formed upon the very testimony which the jury had heard, may have exercised over their minds in conducting them to their verdict. It is sufficient that it was calculated to have an effect and to mislead. The death of the deceased from poison was an essential element in the crime charged against the prisoner, and necessary to be proved in order to his conviction. It could be proved only by legal and competent evidence. The opinion expressed by Dr. Gregory, in the form in which it was allowed to be given, was not competent, and entitles the prisoner to another trial, in which he will have the protection of all those safeguards which the wisdom and (515) humanity of the law provide for all who are put in peril.

PER CURIAM. *Venire de novo.*

Cited: S. v. Bowman, 80 N. C., 432; *S. v. Cole,* 94 N. C., 965; *S. v. Potts,* 100 N. C., 462; *S. v. Keene, ib.,* 511; *Moffitt v. Asheville,* 103 N. C., 261; *S. v. Wilcox,* 132 N. C., 1134; *Summerlin v. R. R.,* 133 N. C., 554, 556; *Jones v. Warehouse Co.,* 137 N. C., 349; *Beard v. R. R.,* 143 N. C., 139; *Parrish v. R. R.,* 146 N. C., 128; *S. v. Khoury,* 149 N. C., 457; *S. v. Banner, ib.,* 524; *Pigford v. R. R.,* 160 N. C., 103; *Mule Co. v. R. R., ib.,* 255.

STATE v. E. C. HARMAN.

Indictment—Murder—Manslaughter—Excusable Homicide.

1. On a trial for murder, if it appears that the prisoner saw the deceased in his (prisoner's) house with his arms around the neck of prisoner's wife, and thereupon entered the house, when the deceased came at him with a knife, and the prisoner killed him, it is manslaughter.
2. If A., on entering his own house, is assailed by another with a knife, and thereupon enters into a fight with him, standing not entirely on the defensive, and kills him, it is at the most manslaughter.
3. If in such case A. stands upon the defensive and does not fight until he is attacked and threatened with death or great bodily harm, when to save himself he kills his assailant, it is excusable homicide, even if A. does not turn and flee out of the house.

MURDER, tried at Fall Term, 1877, of WATAUGA, before *Cloud, J.*

The prisoner was charged with the murder of Elisha Trivett, and the statement of the case sent to this Court is substantially as follows:

Eveline Trivett, wife of deceased, testified that on Sunday, 24 June, 1877, her husband started from home, saying he was going to one Tice Harman's to sell his cattle. She and her children walked with (516) him a part of the way. The road from the deceased to said Harman's leads in about 100 yards of the prisoner's house. Two paths lead from the prisoner's house to this road, one in the direction of said Harman's and the other in the direction of the deceased. The body of deceased was found about 20 steps from the point where the path entered the road towards Tice Harman's. Shortly after deceased left, she heard the prisoner's wife (her sister-in-law) calling some one, and screaming, and then it was she heard the crack of a rifle. She went down the road soon afterwards, about 300 yards, and found the body of her husband, lying on his back, with hat over his eyes, and a bullet-hole in his breast. His left hand was cut in several places. His pocketknife was open in his right hand. There were some logs and bushes by the side of the road, behind which were signs of tracks, etc. The prisoner had threatened to kill deceased if he did not keep away from his house during his absence. It was also in evidence that about 12 o'clock the prisoner came running to the house of Frank Triplett and stated that Elisha Trivett was lying dead in the road opposite his house, and that he did not know who killed him. There was much circumstantial evidence tending to show that the prisoner shot the deceased from behind the logs, etc.

Benjamin Greer, a justice of the peace, testified that he issued a warrant for the arrest of the prisoner in order that an examination of the circumstances attending the alleged homicide might be had; about a

week thereafter and in consequence of a message received from one Farthing, he went to the house of the latter, where he found the prisoner, and said to him: "I suppose you admit that you killed Trivett?" The prisoner replied: "Yes, I do." The prisoner's counsel objected to this question and answer. Objection overruled.

The State then introduced Farthing, who testified that the (517) prisoner came to his house and said he had killed Trivett in his (prisoner's) house, and said further: "I came up and looked through a crack of the house; saw Trivett with his arms around my wife's neck in the house; saw enough to satisfy me; nobody knows what I had to bear; I ran around to the door; I hardly know how I got there; I would not have shot him if he had not come at me with a knife."

This witness further testified that the above confession was voluntary. The prisoner then offered to put in evidence his confessions made to one Church the day after the homicide, and other confessions made to the justice who committed him to jail, to show that he had made substantially the same statement as was testified to by the witness Farthing; and also offered to prove that a general state of adultery existed for several years, and up to the time of the homicide, between his wife and the deceased, but both were excluded upon objection by the State.

The prisoner's counsel in his argument to the jury asked his Honor to charge: (1) "That if Harman caught Trivett in his house, engaged in adultery with his wife, and on that account immediately killed him, it would be manslaughter: (2) That if he caught Trivett in his house with his arms around Mrs. Harman, and immediately slew him by reason of the *furor brevis* caused by the suspicion of adultery, and if the suspicion was reasonable, of which the jury were to judge, it would be manslaughter." These instructions were given.

The counsel then asked for the following instruction: "That if there was a mutual combat between the parties, each fighting on equal terms, each having a knife, and the prisoner slew the deceased, it would be manslaughter," to which his Honor did not respond.

The counsel also asked the court to charge, "That if deceased made an assault upon the prisoner with his knife, and it was so sudden and violent that the prisoner could not retreat without manifest danger of death or great bodily harm, and the prisoner slew him for this (518) cause, it would be homicide excusable for self-defense," to which his Honor replied, "That the prisoner could not be excused unless he retreated to the wall, even if deceased assaulted him with a deadly weapon in his own house."

The counsel also asked the following: "That if prisoner found deceased in his own house, engaged in an act of adultery with his wife, the

prisoner was not bound to flee or retreat to the wall, and if he slew deceased under these circumstances to save himself from death or great bodily harm, it would be excusable homicide," which his Honor declined to give; but, among other things, told the jury, "that if he killed him from behind logs, in the road, as contended by the solicitor, it was murder. If he watched him going towards his home, and came to the house with malice and killed him, it was murder; but if finding him in his house under reasonable suspicion of adultery, he killed him out of the *furor brevis* excited thereby, it would be manslaughter." Verdict, "Guilty of murder." Judgment. Appeal by prisoner.

Attorney-General for the State.
Folk & Armfield for the prisoner.

READE, J. 1. "Should he deal with our sister as with an harlot?" is the voice of unrestrained human nature since Shechem defiled the daughter of Jacob and was slain by her brothers. Gen., ch. 34.

We have restrained human nature in so far as we say, You shall not slay in redress of a past wrong; but if you slay the wrongdoer in the *very act,* it will not be murder, but manslaughter. The redress for past offenses must be sought through the process of the court.

In the case before us the prisoner looked through a crack of his house, and saw the deceased, whom he had before suspected, with his (519) arms around his wife's neck, and saw enough to satisfy him, and ran around to the door and into his house, when the deceased came at him with a knife, and he killed him. The situation was not the *very act,* but it was severely proximate, and fine distinctions need not be made. This is clearly not murder, but manslaughter. *S. v. Samuel,* 48 N. C., 74; *S. v. John,* 30 N. C., 330.

2. Leave adultery out of the question, then we have this case: The deceased was in the prisoner's house in a hostile attitude, and upon the prisoner's entering, came at him with a knife, a deadly weapon, and the prisoner, from the necessity to save himself, killed him.

If upon the prisoner's entering his house and being assailed by the deceased with a knife, he entered into a fight with the deceased and stood not entirely on the defensive, and in the fight slew the deceased, it would be manslaughter at the most. But if the prisoner stood entirely on the defensive and would not have fought but for the attack, and the attack threatened death or great bodily harm, and he killed to save himself, then it was excusable homicide, although the prisoner did not run and flee out of his house. For, being in his own house, he was not obliged to flee, but had the right to repel force with force, and to increase his force, so as not only to resist, but to overcome the assault.

In not giving the prisoner the benefit of these principles his Honor erred.

We have assumed the facts to be as stated above, not because they were facts, but because the State offered in evidence the declarations of the prisoner, and he stated the facts to be as we have stated them. And the prisoner had the right to have the law declared upon the hypothesis that the facts were as he had stated them. What the facts really were was a question for the jury.

PER CURIAM. *Venire de novo.*

Cited: S. v. Kennedy, 169 N. C., 295.

---

(520)

STATE v. ISRAEL SAVAGE.

Indictment—Murder—Evidence—Cooling Time—Jury.

1. On a trial for murder, it was in evidence that the prisoner, the deceased, and others were at work in a field together, when a dispute occurred between the deceased and a kinswoman of prisoner; that prisoner reproved deceased for troubling her, when deceased remarked: "If you make me mad, I would think no more of going to the house and getting Mr. J.'s gun and shooting you than nothing," and prisoner replied: "If you want to get the gun, you had better go"; that then the prisoner went off and in about half an hour returned with a hatchet behind him and asked deceased if he meant what he said; the deceased said he did, and thereupon the prisoner struck him with the hatchet and killed him: *Held*, that nothing had occurred to dethrone the prisoner's reason, and his Honor below might have told the jury without any qualification that ample cooling time had intervened.

2. During the selection of a jury on a trial for murder, several jurors answered that "they had formed and expressed the opinion that the prisoner was guilty," whereupon his Honor said "that in olden times judges sometimes punished men for expressing opinions in such cases, but the court did not propose to do that; and such expressions might have a tendency to prejudice the community from which jurors were to be selected, and thereby the prisoner might be seriously damaged. Hereafter it was to be hoped that there will be no such expression of opinion, in order that fair trials may be had for all who are accused of crime": *Held*, not to be error.

MURDER, tried at January Special Term, 1878, of NORTHAMPTON, before *McKoy, J.*

The prisoner was charged with the killing of Joseph Hill. The facts material to the points decided are as follows: The prisoner, the deceased, and others were gathering cotton in a certain field, and in consequence of a dispute between the deceased and a woman (who was a kinswoman

of prisoner and engaged at work with them), he seized her in an angry manner, and the prisoner reproved him and remarked that her (521) husband was crippled, and that he could not serve his wife so. The deceased replied, "If you make me mad, I would think no more of going to the house and getting Mr. J.'s gun and shooting you than nothing." The prisoner replied, "If you want to get the gun, you had better go."

He (prisoner) then went to the house, a short distance off, and returned in about a half hour with a hatchet behind him, and upon approaching the deceased, asked him if he meant what he had said. The deceased said he did, and thereupon the prisoner struck him with the hatchet on the head and killed him.

The prisoner's counsel asked the court to charge the jury, "That if they were satisfied the assault made by deceased upon prisoner's kinswoman, and the threat he made to shoot prisoner, dethroned the prisoner's reason, and he did the killing before he had time to cool, and without malice, it was manslaughter and not murder." His Honor declined to give the instruction as prayed for, but in response thereto said that there could be no murder without malice aforethought, and if the blow had been given to save the woman's life, or to protect her from great bodily harm, he would be guilty of neither; and that the question of cooling time did not arise where there had been no conflict between prisoner and deceased, and where no assault had been committed upon the prisoner; nor where, as in this case, the deceased used a switch in his assault on the woman, and the prisoner used a deadly weapon after he returned and found the woman in no danger, and that words only would not mitigate the crime from murder to manslaughter. The jury returned a verdict of guilty of murder.

The prisoner's counsel moved for a new trial because the court had said, when only two jurors had been selected and upon several other jurors answering that "they had formed and expressed the opinion that the prisoner was guilty," "that in the olden times judges sometimes punished men for expressing opinions in such cases, but the court did (522) not propose to do that; and such expressions might have a tendency to prejudice the community from which jurors were to be selected, and thereby the prisoner might be seriously damaged. Hereafter it was to be hoped that there will be no such expression of opinion, in order that fair trials may be had for all who are accused of crime." The motion was denied. Judgment. Appeal by prisoner.

Attorney-General for the State.
No counsel for the defendant.

FAIRCLOTH, J. The prayer of the prisoner, that if the jury believe that his reason was dethroned, and that he did the killing before he had time to cool, and without malice aforethought, was correct as a legal proposition; but the difficulty is there was no evidence to support it.

Nothing had occurred to dethrone his reason, and his Honor might have told the jury without any qualification, that ample cooling time had intervened. The fatal blow was given with a concealed and deadly weapon, not in defense of the life of the prisoner's kinswoman, nor to save her from great bodily harm, for she was not in danger in either respect. The remarks of his Honor in the presence of the venire, pending the selection of the jury, were not calculated to do the prisoner any harm, especially as he disavowed any purpose to punish them for the expression of any opinion they might have formed. The subsequent action of the jurors as they were called negatives the assumption that they had been intimidated by the court. There being no other exceptions and no error appearing from the record, the judgment must be affirmed.

PER CURIAM. No error.

Cited: S. v. Debnam, 98 N. C., 719.

---

(523)

STATE v. SIDNEY MATTHEWS AND FRANK HUMPHREYS.

Murder—Evidence—Character of Deceased—Excusable Homicide—Presumption of Malice—Judge's Charge.

1. On a trial for murder it was in evidence that the defendant H. charged deceased with perjury, adding, "I can prove it. Come up here, M." Whereupon the defendant M. stepped up, when the deceased struck him, knocked him on his knees and stamped at him; M. rose up and deceased immediately thereafter staggered back, mortally wounded, one witness stating that both M. and deceased had knives in their hands. It was further in evidence that M. was small, crippled, and one-eyed, and deceased was a strong man: *Held,* that evidence of the character of deceased for violence was admissible.

2. The evidence as to H. being, that he was cursing deceased, said deceased had sworn to a lie, and called on M. to prove it, and when deceased knocked M. down, H. put his hand in his pocket and said he "would shoot the d——d rascal," or "stand back from the ————; I am going to shoot him," when his wife caught hold of him and prevented him: *Held,* that what H. said or did before the fight between deceased and M. was not intended to provoke such fight, had nothing to do with it, and ought to have been excluded.

3. To render the act of killing excusable on the ground of self-defense, the defendant should not only have reasonable ground to apprehend, but also should actually apprehend, either that his life was in imminent danger or that deceased was about to do him some enormous bodily harm, and there must be a necessity for taking life from the fierceness of the assault, etc.

4. In this case the evidence being as above stated: *Held*, that there was no evidence from which the jury might reasonably infer that M. intended or was willing to engage in a fight with deceased.

5. *Held further*, that the circumstances of the case rebutted the presumption of malice raised from the fact of killing, and it was error in the judge below to submit the question of murder to the jury, the question as to whether the presumption of malice had been rebutted or not being a question of law.

6. It is the duty of a judge to state clearly the particular issues arising on the evidence and to instruct the jury as to the law applicable to every state of the facts which upon the evidence they may reasonably find to be the true one.

MURDER, removed from Yadkin and tried at Fall Term, 1877, of FORSYTH, before *Cox, J.*

The defendants were charged with the killing of one Costin D. Butner. The evidence was substantially as follows: Frank Matthews, a witness for the State, testified that the homicide was committed opposite the defendant Humphreys' house, on the Yadkinville road; that he was at his home on the afternoon of the day of the killing, about 300 yards from the road, and upon his hearing loud cursing, he went over and saw the deceased, defendants, and John Carter, Cannady Carter, and defendant Humphreys' wife. He stopped in about 75 yards of them and sat down. Humphreys was cursing Butner; said he had sworn d—d lies against him at the courthouse. Butner said he had not. Humphreys replied and said he was a d—d liar, and he could prove it by Matthews. Witness also stated that thereupon *deceased advanced three steps* and struck Matthews a backhanded lick, knocked him on his knees, kicked him and stamped at him; about the time Matthews rose, the deceased commenced falling backward, rose a second time, staggered and fell, and died in a short time. Humphreys put his hand behind him and said he would shoot the d—d rascal, and his wife, screaming, threw her arms around him and held him, until the deceased fell. When Matthews was down, partly on his side, he was stamped about his legs and body. Matthews raised the deceased's head after he had fallen, rubbed it with camphor, and said: "Go for the doctor, quick."

(525) Enoch Matthews, for the State, testified, among other things, that when he got there he heard Humphreys say to the deceased, "D—— you, I'll shoot you; got it laid up for you; you swore d——d lies against me at the courthouse; I can prove it; come up here, Sidney

Matthews." Matthews thereupon *stepped up,* and the deceased struck him and he fell partly on his hands; deceased kicked him and stamped at him, but did not touch him (as witness thought). While down, Matthews said, "Fellows, don't let him kill me," and Humphreys said, "Stand back from the son of a bitch; I'm going to shoot him," and motioned as if he was getting a pistol. (At this time his wife interfered as testified to by the former witness.) Matthews rose half up, and as he rose, deceased fell at his feet and rose and fell again, and died in a short time. Matthews then said, "Don't let him lie here and die this way, but try to do something for him," and rubbed his head, etc., as testified to above. Matthews moved in front of the deceased, when told by Humphreys to come up and prove he lied, and stopped long enough to speak before deceased struck him; but witness heard no words pass, and saw no knife.

Henry Jarrett, for the State, testified to substantially the same state of facts. Upon cross-examination of this witness it was proposed to prove the declarations of Humphreys after the homicide, as explaining his acts; but upon objection by the solicitor they were excluded.

Frank Munday, for the State, testified that some one, two, or three months before the homicide he was with the defendants and heard Humphreys say that deceased was a d—n rascal, to which Matthews assented. It was in evidence that Matthews was a peaceable and quiet man, small, one-eyed, and a cripple; that Humphreys was a small man, and deceased was a large and powerful man, wore No. 10 boots and weighed about 215 pounds; and that defendants and deceased had lived together on the same plantation and were well acquainted. The counsel for the defendants thereupon proposed to show the character of the deceased as a violent and dangerous man; but upon objection (526) the testimony was excluded.

A. C. Snipes, for the State, testified "that at a sale near the place of the homicide and an hour or two before its occurrence, Humphreys, upon his (witness) proposing to sell him some plows, introduced the name of the deceased, who was not present, and spoke harshly of him; that they separated, and Humphreys returned in a short time with Matthews, and commenced cursing Butner again; he said he had cursed him to his face, and called on Matthews to confirm his statement; he also said that the next time he fought Butner he would kill him, and that he had rather see him die than to see witness eat a biscuit"; that he had promised to go home with deceased that night, had left the sale before deceased, and expected deceased to overtake him; but upon his failing to do so he returned and found him dead in the road; and that the wound was six inches below the groin. This witness also said upon

cross-examination, that he had made the above statement before the coroner's jury, and thereupon the defendants introduced members of said jury, whose testimony tended to contradict the evidence of said witness in that he stated upon the inquest that what he knew was hearsay. The defendants then proposed to impeach his character by showing "that in Yadkin County, where he lived, he had a general character for having been discharged from a certain mill for taking too much toll," but upon objection this was excluded.

Cannady Carter, for the State, testified that John Carter and the deceased were walking up the road quarreling, and when they got opposite Humphreys' house Matthews and Humphreys came out. Something was then said about $10, and the deceased and Humphreys began to quarrel, the deceased speaking in a loud and angry tone. During (527) the altercation and in reply to his wife's request that he should leave and go to the house, Humphreys said, "I told you I am not afraid of him." As Matthews was moving as if passing deceased, he knocked him down. Don't think that Humphreys made any effort to get at the deceased while Matthews was down. The deceased, after knocking him down, stood still and was doing nothing, and as Matthews rose he passed his hand out toward deceased, and when he got up they stood confronting each other with drawn knives, when the deceased soon fell.

The defendants' counsel requested the court to give the following special instructions:

1. If the jury believe that Matthews had reasonable ground to apprehend that the assault of the deceased was made with felonious intent, that he was not bound to retreat, but he had a right to kill in self-defense.

2. That although the jury may believe that Matthews was willing to engage in the difficulty between the deceased and Humphreys, yet if they should believe that Matthews after being stricken down was unable to retreat, and had reasonable ground to apprehend that he was about to receive great bodily harm from the deceased, and stabbed the deceased in consequence thereof, that this of itself would not make him guilty of either murder or manslaughter; and the question of reasonable ground for such apprehension was solely a question for the jury to determine.

3. Ordinarily in trials for homicide the killing by the prisoner being found or admitted, the law implies malice, and the burden lies upon the prisoner to show to the satisfaction of the jury that the killing was done under circumstances reducing the offense to manslaughter, or excusable or justifiable homicide; but when circumstances which come out from the examination of the State's witnesses tend to establish such defense,

then it is the duty of the jury to consider all the evidence, and if they are not satisfied of the guilt of the accused beyond a reasonable doubt, they should acquit.

The court read the above instructions to the jury, and stated (528) that while they embodied correct principles of law, yet it would lay down the following rules for their guidance *in this case,* and after defining the grades of homicide, said: The fact of killing being first proved, all the circumstances of necessity or infirmity are to be satisfactorily proved by the accused, unless they arise out of the evidence against them, for the law presumes the fact to have been done in malice until the contrary appears. The jury are therefore to consider all the evidence and circumstances of the homicide, and unless satisfied, etc. And in passing upon the facts they should consider whether, if not guilty of murder, they or either of them may be guilty of manslaughter, or whether they acted in self-defense; that if it appeared from the circumstances of the case, the manner of the assault, the strength of his assailant, or the like, that Matthews had reasonable ground to apprehend that his life was in imminent danger, he was justified in killing his assailant, but there must be a necessity then for taking life from the fierceness of the assault, etc., before he could be excused on the ground of self-defense; that a bare fear that deceased intended to kill him, unaccompanied by some overt act, would not justify Matthews in killing him, for there must be an actual danger at the time, or reasonable ground to fear that there was; and of this the jury, and not the prisoner, must be the judge; that if they engaged in a sudden combat, becoming heated thereby, and Matthews drew a deadly weapon, or used one in his hands, having no intent to use it when the fight commenced, and slew deceased, he is guilty of manslaughter; and so, if he had merely been kicked or struck by the deceased, who was not endeavoring to pursue the combat further; or if it all occurred in rapid succession. But if deceased was pursuing his advantage so as to place Matthews in imminent peril of his life or great bodily harm, he might slay his adversary in self-defense.

As to Humphreys: If he was present and did or said anything (529) calculated and intended to make known to Matthews that he would help if need be by taking part in the fight, or keeping others off, or if he egged him on, he would be guilty of aiding and abetting, and equally guilty with Matthews. You will apply the facts, etc., and give the defendants the benefit of all reasonable doubt and say whether one or both of them be guilty or otherwise; and if guilty, of what. The jury returned a verdict finding each defendant guilty of manslaughter. Judgment. Appeal by defendants.

Attorney-General for the State.
Watson & Glenn for the defendants.

RODMAN, J. There is a difference in the cases of these two defendants, and they will require to be separately considered. But there are some observations applicable to both. Both were indicted for the murder of Butner, and both were convicted of manslaughter.

The case apparently professes to set forth all the evidence given upon the trial. But probably it omits some that was given, because the instructions asked for by the counsel for the defendants, and those given by the judge, seem to be founded on the assumption of certain facts which do not appear, or at least do not directly appear, in the evidence set forth.

1. We will first consider the case of Matthews. The facts in evidence as they relate to him, stated generally, were these: Butner (the deceased) and the two defendants, and some others, were in a public road. Humphreys charged Butner with having sworn lies against him, and said he could prove it by Matthews. According to one witness (Frank Matthews), he said to Butner, "Damn you, I will shoot you; you swore damn lies against me, and I can prove it. Come up here, Sidney (530) Matthews." This witness states that "Matthews then stepped up. Deceased advanced three steps and struck Matthews a back-handed lick, knocked him on his knees and stamped at him. When Matthews was down, he was partly on his side, and the stamping was about his legs, and then his body."

Enoch Matthews testified substantially as above, except that he does not say that deceased advanced upon the defendant Matthews. He says that as defendant Matthews stepped up deceased struck him and he fell partly on his hands, when deceased kicked him, etc. Matthews rose, and about that time deceased commenced falling backward, rose a second time, staggered and fell, and died in a short time. No witness saw any blow with a knife given.

Carter, a witness, says that when Matthews rose to his feet he saw him and the deceased standing confronting each other with knives in their hands, when deceased soon fell, and in a few minutes died. He died from a wound inflicted by a knife in his thigh about six inches below the groin. It is evident from the testimony that if Matthews gave the wound, as the jury must have believed that he did, it was given while he was on his knees, or otherwise prostrate on the ground.

The judge allowed it to be given in evidence that he was small, crippled, and one-eyed, and that the deceased was a strong man, but refused to allow the defendants to prove his character for violence. The defendants excepted, and we think that the judge should have received the evi-

dence, as coming within the exception to the general rule against such evidence, established in *S. v. Turpin,* 77 N. C., 473.

The issue made by the evidence in this case was, Did Matthews give the wound in self-defense? Our opinion on this point would entitle the defendants to a new trial. But other questions are presented in the case which may again occur upon a second trial, and upon which the defendants are entitled to our opinion.

The defendants prayed for certain instructions which the judge (531) read to the jury, and stated that while they embodied correct principles of law, yet he would lay down the following rules for their guidance in this case, etc. This language was a virtual refusal to give the instructions. In this we think the judge was right, because they were less favorable to the defendants than what they were entitled to have.

The first of these instructions is defective, rather than positively erroneous. It should have added to the hypothesis that Matthews "had reasonable ground to apprehend," etc., the further words, "and *did* apprehend," etc. It might also advantageously have used some other equivalent words in the place of "felonious assault," which although strictly correct, the jury were not likely to understand.

The second is more objectionable. It seems to assume that there was evidence from which the jury might reasonably and justifiably find that Matthews "was willing to *engage in the difficulty* between the deceased and Humphreys," whereas we do not see in the case as presented to us any evidence of an intention on the part of Matthews to engage in the fight to which Humphreys had challenged the deceased. It is true he "stepped up" when he was called on by Humphreys to prove what he had said, but whether with the intention to affirm or to deny the statement of Humphreys does not appear. Certainly the mere fact that he stepped up or, as one witness says, seemed to be passing deceased when deceased struck him, would not tend to prove an intention to get into a fight with the deceased, and the law presumes in favor of every man's innocence, and requires a criminal intent to be proved.

Strictly speaking, the defendants, in order to make evidence of the violent character of the deceased competent, should have offered to prove that it was known to Matthews. But there was some evidence of that in the fact that they lived in the same neighbor- (532) hood and were acquainted.

We proceed now to consider the instructions given by the judge in lieu of those asked for. After correctly defining murder, manslaughter, and excusable homicide, he says to the jury in substance, that when a homicide is proved the law presumes malice, but the presumption may

be rebutted by circumstances appearing in evidence, whether put in on the part of the State or of the defendants. To this there can be no exception. The error of the judge in this part of his charge was omission only. But we think in a case like this he was required to go further than he did, and to inform the jury that if they believed the witnesses who were contradicted, that the circumstances in evidence did rebut the presumption of malice. As malice is a presumption which the law makes from the fact of killing, it must necessarily be a matter of law what circumstances will rebut the presumption. The jury must pass on the existence of the facts which constitute the circumstances, but the judge should instruct them, as matter of law, that if certain facts which the evidence tends to establish have been proved to their satisfaction, the presumption of malice is rebutted, and they must acquit the defendant of murder. *S. v. Hildreth,* 31 N. C., 429. Whether the presumption has been rebutted or not is a question of law, just as legal provocation, sufficient cooling time, deadly weapon, reasonable time, negligence, etc., are. *S. v. Craton,* 28 N. C., 164; *S. v. Collins,* 30 N. C., 407; *S. v. Sizemore,* 52 N. C., 206

In *S. v. Hildreth,* 31 N. C., 429, the Court says: "It is the undoubted province and duty of the court to inform the jury, upon the supposition of the truth of the facts as being agreed or found by the jury, what the degree of the homicide is. Foster Cr. L., 255; *S. v. Walker,* 4 N. C., 662. If it were not so there would be no rule of law by which a killing could be determined to be murder, but the whole matter of malice
(533) or alleviation of malice would fall to the discretion and decision of the jurors in each particular case, and there would be no mode of reviewing it so as to reverse the decision, though erroneous. There could be no tyranny more grievous than that of leaving the citizen to the prejudices of jurors, or the discretion of judges, as to what ought to be deemed an offense which should or should not deprive him of his life. The only security for the accused is for the law to define *a priori* what shall constitute a crime, and, in the case of capital punishment, when it shall be inflicted.

"It is one of the praises of our law that such have always been its provisions. The presiding judge, therefore, did not transcend his power, but performed simply his duty in directing the jury upon the point whether the killing here amounted to murder or manslaughter, taking the facts to be as deposed to by the witnesses."

The judge in this case left the question of murder an open one for the jury, and without disregarding his instructions they might have found the defendant guilty of that crime, although there was no evidence of express malice, and the legal presumption was rebutted by the testi-

mony of every witness as to the sudden and unexpected beginning of the affray. It cannot be said because the jury found the defendant guilty of manslaughter only, that he was not prejudiced by the omission of the judge. The true question was between manslaughter and homicide and self-defense. The attention of the jury was distracted from that by their being required to pass on the question of murder, which was contradicted by all the evidence, and the defendant was compelled to present his defense to them, burdened by a weight of accusation from which he ought to have been relieved by the instruction of the judge.

The instructions were erroneous in other particulars. The judge said: "If it appeared from the circumstances of the case, . . . that Matthews had reasonable ground to apprehend that *his life was in imminent danger,* he was justified in taking the life of his assailant, but there must be a necessity for taking life from the fierceness (534) of the assault, etc., before he could be excused on the ground of self-defense." The judge omitted here to say that Matthews must have believed in the reality of the danger, and he omitted also a much more important portion of the rule which he undertook to lay down. It is said in all the authorities, and cannot be doubted, that if a man who is assailed believes, and has reason to believe, that although his assailant may not intend to take his life, yet he does intend and is about to do him *some enormous bodily harm,* such as maim, for example, and under this reasonable belief he kills his assailant, it is homicide *se defendendo* and excusable. It will suffice if the assault is felonious. Foster, 274. No doubt the omission of this qualification of the rule was simply inadvertent. We think there are other expressions of the judge which were incorrect as not being applicable to the evidence, and likely to be prejudicial to the defendants. But it is unnecessary to consider them.

2. We pass now to the case of Humphreys.

As to him, the judge told the jury that, "if he was present and did or said anything calculated and intended to make known to Matthews that he would help if need be, by taking part in the fight, or keeping others off, or if he egged him on, he would be guilty of aiding and abetting, and equally guilty with Matthews."

This is perhaps a correct statement of an abstract principle of law. We are not called on to decide upon that. The error, as we think, is that it was too general and did not with sufficient particularity furnish the jury with a rule which they could apply to the facts as they might find them to be. The evidence as to Humphreys, so far as it is material, may be briefly stated thus: When first seen by the witnesses he was cursing deceased; said he had sworn to a damned lie, and called on Matthews to prove it. When deceased knocked Matthews (535)

down Humphreys put his hand in his pocket and said he would shoot the damned rascal, when his wife seized and held him until deceased had fallen. Another witness testified in substance that before Humphreys called Matthews up, he said to deceased, "Damn you, I'll shoot you," etc., and that when Matthews was down Humphreys said, "Stand back from the son of a bitch; I am going to shoot him," when his wife held on to him, etc. He did not shoot.

The judge left it an open question to the jury whether or not this defendant was guilty of murder. If he erred in this respect as to Matthews, he of course erred as to Humphreys. As he did not commit the homicide, there was no presumption of malice in him to be rebutted. To make him guilty of murder there must have been a concert between him and Matthews to kill the deceased, of which there is no evidence, and which the jury have negatived. It was therefore quite as unfair to him as it was to Matthews, to compel him to argue before the jury against this accusation.

In another respect the charge of the judge presented the case of this defendant to his prejudice. He had challenged the deceased to fight *with him.* But there is no evidence tending to prove that he intended or expected the fight which took place, that is, one between Matthews and the deceased. All the evidence shows that this fight was sudden and unexpected. If Matthews acted in self-defense, of course Humphreys was guilty of no crime. The instructions assume that Matthews was guilty of some crime, either murder or manslaughter, and put to the jury the issue, whether Humphreys abetted him. If the judge had said, If you find Matthews guilty of manslaughter, then, if *during the fight and before the fatal wound was given,* Humphreys did or said anything, etc., his instructions would have been unobjectionable so far as they went.

But they would even then have been imperfect and unfair, in not
(536) calling the attention of the jury to the imperfection of the evidence as to the participation of Humphreys. What he said or did before the fight began must be excluded from consideration, for although it was calculated and intended to provoke a breach of the peace between him and the deceased, it was neither calculated nor intended to provoke a fight between Matthews and the deceased. What he said after the fatal wound was given must also be excluded, because it could not encourage, aid or abet Matthews to give it. The testimony as to the conduct of Humphreys while the fight was going on is, that when Matthews fell Humphreys put his hand behind him and said he would shoot the damned rascal, when his wife seized and held him until deceased fell. Another witness says that Matthews, while he was down, said, "Fellows, don't let him kill me," when Humphreys said, "Stand back from the son of a bitch; I'm going to shoot him," when his wife seized him, etc.

What Humphreys said was calculated to encourage Matthews and the jury might not unreasonably have found that it was said during the fight and before the fatal wound was given, and that Humphreys was a principal in the manslaughter. But they might also have found that Humphreys reasonably believed that Matthews was about to be feloniously killed, and interfered to the extent that he did to prevent a felony, as he lawfully might. We cannot say which of these views the jury might have taken. The error of the judge consisted in his failing to present particularly to the jury the law applicable to these hypothetical cases, which are the only ones that could arise and which did arise, on the evidence, and in leaving it to them in a general way, and without any particular instructions, to find whether Humphreys did or said anything to encourage Matthews.

It will be seen from the manner in which we have reviewed the (537) instructions of the able and learned judge who presided at this trial, that in our opinion a judge who presides at a trial in which human life is at stake does not fully perform the duties which his office imposes on him by stating to the jury, however correctly, principles of law which bear more or less directly, but not with absolute directness upon the issues made by the evidence in the case. To do that only is easy and almost mechanical. We think he is required, in the interest of human life and liberty, to state clearly and distinctly the particular issues arising on the evidence, and on which the jury are to pass, and to instruct them as to the law applicable to every state of the facts which upon the evidence they may reasonably find to be the true one. To do otherwise is to fail to "declare and explain *the law arising on the evidence,*" as by the act of Assembly he is required to do. C. C. P., sec. 237.

To do this requires the exercise of a cultivated intelligence, and to do it in a complicated case in the necessary haste of a jury trial, so as to stand subsequent examination, is one of the highest efforts of the mind. The ablest judges, although assisted by able counsel, do sometimes fail, and when that appears, it is the imperative duty of a court of appeals to order a new trial. *S. v. Dunlop,* 65 N. C., 288. An application was made to this Court to reduce the amount of bail required of the defendants by the court below after their conviction, as being excessive. The decision granting them a new trial renders any decision on the application unnecessary.

PER CURIAM. *Venire de novo.*

Cited: S. v. Byers, 80 N. C., 427; *S. v. Matthews, ib.,* 418; *S. v. Rogers,* 93 N. C., 531; *S. v. Hensley,* 94 N. C., 1032; *S. v. Gilmer,* 97 N. C., 431; *S. v. Lawson,* 98 N. C., 763; *S. v. Rippy,* 104 N. C., 756; *S. v. Boyle, ib.,* 822; *S. v. Horn,* 116 N. C., 1046; *S. v. Wilcox,* 118 N. C., 1133; *S. v. Melton,* 120 N. C., 597; *S. v. Gentry,* 125 N. C., 735,

741; *S. v. Barrett,* 132 N. C., 1010; *S. v. Capps,* 134 N. C., 628; *S. v. Lipscomb, ib.,* 695; *S. v. Clark, ib.,* 704; *S. v. Garland,* 138 N. C., 685; *S. v. Jarrell,* 141 N. C., 724; *S. v. Hill, ib.,* 771; *S. v. Lilliston, ib.,* 871; *S. v. R. R.,* 145 N. C., 571; *Blake v. Smith,* 163 N. C., 274; *S. v. Beal,* 170 N. C., 766.

(538)

STATE v. RICHARD COOLEY AND OTHERS.

Peace Warrant—Costs.

1. A peace warrant in which is alleged no threat nor fact or circumstance from which the court can determine whether the fear of the prosecutor is well founded or not, should be quashed.

2. In such case it was held to be error to tax the defendant with costs.

PEACE WARRANT, heard at November Term, 1877, of WAKE Criminal Court, before *Strong, J.*

A peace warrant (in which the prosecutor alleged that he had reason to fear and did fear that defendants would do him private injury, etc.) was obtained at the instance of one Paschall, and the defendants were arrested and held to answer before a justice of the peace, who, after hearing the evidence, adjudged that the warrant be dismissed at the costs of defendants. And in the court below, their counsel moved to quash the proceeding, which motion was denied; and after hearing the evidence on the part of the State and defendants, his Honor ordered the defendants, then in court in obedience to their recognizance, to pay the costs of the proceeding, and the defendants appealed.

T. P. Devereux, who prosecuted in the court below, appeared with the Attorney-General for the State.

W. H. Pace for the defendants.

FAIRCLOTH, J. We do not know what sort of a case was disclosed by the evidence, but we can see that the warrant ought to have been quashed on defendants' motion, on the ground that it or the affidavit alleged no threat, fact, or circumstance from which the court could determine whether the "fear" of the prosecutor was well founded or not, nor for which the prosecutor if swearing falsely could be prose-
(539) cuted. There being no charge against the defendants, of course they could not be taxed with the costs.

Error. Let this be certified and the proceedings quashed below.

PER CURIAM. Reversed.

Cited: S. v. Goram, 83 N. C., 665.

STATE v. ABRAM CANNADY.

Peace Warrant—Frivolous or Malicious Prosecution—Costs—Imprisonment of Prosecutor.

1. A prosecutor in a peace warrant can be ordered to pay costs where the prosecution is frivolous or malicious; and if he fail to do so, he can be imprisoned therefor.
2. Neither a fine nor costs inflicted as a punishment is a *debt* within the meaning of the Constitution in relation to this matter.
3. The Legislature has the power to prescribe that the prosecutor in a criminal action may be made to pay costs, where the defendant is acquitted and the prosecution is frivolous or malicious.
4. There is nothing cruel or unusual in requiring a prosecutor in such case to pay costs.

APPEAL from an order made at January Term, 1878, of WAKE Criminal Court, by *Strong, J.*

A peace warrant was obtained at the instance and upon the oath of one Abram Cannady, and his Honor below, after hearing the evidence of the prosecutor (Cannady), and that in behalf of one McCullers (the defendant in the warrant), adjudged that the prosecution was without cause, frivolous and malicious on the part of Cannady, and ordered him to pay the costs of the proceeding, and to be held in custody by the sheriff until the same were paid. From which judgment the defendant appealed. (540)

T. P. Devereux, who prosecuted in the court below, appeared with the Attorney-General for the State.
Bledsoe & Bledsoe for defendant.

READE, J. The questions are, (1) Can a prosecutor be ordered to pay costs where the prosecution is frivolous or malicious, and (2) be imprisoned therefor if he fail to pay?

The statutes answer both questions in the affirmative: "The party convicted shall be always adjudged to pay the costs, and if the party charged be acquitted, the complainant shall be adjudged to pay the costs, and may be imprisoned for the nonpayment thereof." Bat. Rev., ch. 35, sec. 132.

"If a defendant be acquitted, the costs shall be paid by the prosecutor, if any be marked on the bill, unless the judge shall certify," etc. C. C. P., sec. 560; *S. v. Lupton,* 63 N. C., 483; *S. v. Darr, ib.,* 516. But then it is said that the statute is unconstitutional.

The Constitution provides that in a criminal prosecution no one shall be compelled "to pay costs unless found guilty." And that "No person shall be put to answer a criminal charge except by indictment, presentment, or impeachment." And that "No one shall be convicted but by the unanimous verdict of a jury." And that "There shall be no imprisonment for debt, except in cases of fraud." Const., Art. I, secs. 11, 12, 13, 16. And thence it is insisted that, as the prosecutor has not been indicted, and has not been convicted, he cannot be compelled to pay costs, if costs be regarded as a fine or punishment; and even if indicted and convicted, and the costs be regarded, not as a fine or punishment, but as a debt, he cannot be imprisoned for debt in the absence of fraud.

The questions were well argued, and we have had some difficulty in arriving at a satisfactory conclusion.

(541) It is manifestly the sense of the Constitution and of the statutes that a *defendant* should not pay costs unless convicted. Why be more careful of the *defendant* than of the *prosecutor?* The answer is, that the acquittal of the defendant is substantially the conviction of the prosecutor, where the prosecution is frivolous or malicious. And the same section of the Constitution which provides that no one shall be convicted but by the verdict of a jury, provides further, "that the Legislature may provide other means of trial for petty misdemeanors, with the right of appeal." And so it is not a strained construction to say that the Legislature has prescribed another mode of trial for a petty misdemeanor when it enables the court to compel the prosecutor to pay costs when he has frivolously or maliciously charged a man with a crime, whom the jury acquits.

It is not with a prosecutor as it is with a defendant. A defendant is brought in whether he will or not, and ought not to pay costs unless convicted; but the prosecutor comes voluntarily. He is the actor with knowledge of the consequences of failure. He stipulates beforehand that if his clamor be false, he will pay the costs. And if the defendant is acquitted, and the prosecution is adjudged to be frivolous or malicious, he stands guilty confessed, as if he had submitted or pleaded guilty, and there is no need of a jury to convict him.

It has too long been the practice, both in England and America, to make the prosecutors pay costs in such cases, to doubt its propriety, and we do not think it was the purpose of our Constitution to prohibit it.

It is insisted that the costs in a criminal prosecution are not a fine or punishment, but that they are a *debt;* and that there can be no imprisonment for debt.

In *S. v. Manuel,* 20 N. C., 20, it is said that fine and costs are both *punishment,* and that neither is a *debt* in the sense contemplated by the

Constitution where the relation of debtor and creditor is meant. (542) And manifestly where the judgment is that he pay a fine of so much and the costs, one is as much a punishment as the other. And where the judgment is that he be imprisoned, for say so long, and pay the costs, our statute prescribes that when the term of imprisonment is out he shall still remain in prison until he pay the costs or be otherwise discharged according to law. Bat. Rev., ch. 33, sec. 129.

In *S. v. Manuel, supra,* there is an exhaustive discussion of the questions involved by *Judge Gaston* in delivering the opinion of the Court. In that case the defendant was a free negro, and was fined $20 for an assault and battery, and ordered to be hired out to pay the fine, under the statute then existing. His defense was threefold: (1) That the fine was a *debt,* and that the Constitution forbids imprisonment for debt; (2) That the fine was excessive, in that it was laid and directed by the statute to be laid high enough to cover the costs, although the crime itself did not deserve so high a fine; (3) That the punishment was cruel and unusual, in that it directed the defendant to be *hired out.*

1. The conclusion arrived at on the first defense was that a fine was not a debt within the meaning of the Constitution. That "the Constitution itself discriminates between debts and fines; it provides against unnecessary and wanton imprisonment for the *collection of debts,* but in regard to fines, its language is, excessive bail shall not be required, nor *excessive fines* imposed, nor cruel or unusual punishments inflicted. Here we find a fine classed where it ought to be, among the means used in the administration of *criminal justice* and in immediate connection with other punishment *imposed* or inflicted in the course of that administration. . . . The costs of a convicted offender are not a debt. . . . They are a part of the sentence of the court. . . ." From this review of our usages, legislative acts and judicial interpretations of them, it follows that the sentence pronounced against a convicted criminal, that he should pay the costs of prosecution, is as much a (543) part of his punishment as the fine imposed *eo nomine.*

2. In regard to the second defense, that the fine was excessive, in that it required the fine to be high enough to cover the costs, although the crime itself might not deserve so high a fine, it was said, "that the Legislature had the power to prescribe that a convicted criminal should be fined to the amount of the costs; that it was the peculiar province of the Legislature to declare what should be crimes and their punishments, and that the judiciary could not control the Legislature, except perhaps, "which it would be almost indecent to suppose," the Legislature should grossly exceed its constitutional restraints; that although "the language of the Bill of Rights is addressed *directly* to the judiciary for the regulation of their conduct in the administration of justice, it is the courts

that require bail, impose fines, and inflict punishment; and they are required not to require excessive bail, not to impose excessive fines, not to inflict cruel or unusual punishments, and it would seem to follow that the command is addressed to them only in those cases where they have a discretion over the amount of bail, the quantum of fine, and the nature of the punishment. No doubt the principles of humanity sanctioned and enjoined in this section ought to command the reverence and regulate the conduct of *all* who owe obedience to the Constitution." But when the Legislature, whose peculiar duty it is to make laws, prescribed a punishment, the courts were bound thereby, except perhaps in extraordinary cases, as that was not.

3. In regard to the third defense, that the punishment of hiring out was cruel and unusual, it was held that it was not, because a bond was taken from the hirer, conditioned as an apprentice bond, for his humane treatment, and the well known relation of master and apprentice
(544) was established. And as we had no penitentiary or workhouse, it was appropriate and just to make a convict work out his fine instead of allowing him to go without punishment for his crimes.

So our opinion is: (1) That neither a fine nor costs inflicted as a punishment is a debt within the meaning of the Constitution in relation to this matter; (2) That the Legislature had the power to prescribe, as it has done, that the prosecutor may be made to pay costs, where the defendant is acquitted and the prosecution is frivolous or malicious; (3) That there is nothing cruel or unusual in requiring a prosecutor, who has not been indicted and convicted by a jury, to pay costs, nor is it contrary to the Constitution, because it has long been the practice to do so, and because substantially he stands convicted by his false clamor and the acquittal of the defendant.

PER CURIAM. Affirmed.

Cited: Pain v. Pain, 80 N. C., 325; *S. v. Davis,* 82 N. C., 612; *S. v. Murdock,* 85 N. C., 600; *S. v. Wallin,* 89 N. C., 580; *S. v. Byrd,* 93 N. C., 628; *S. v. Dunn,* 95 N. C., 700; *S. v. Hamilton,* 106 N. C., 661; *S. v. Burton,* 113 N. C., 659; *S. v. Parsons,* 115 N. C., 732; *S. v. Nelson,* 119 N. C., 800; *S. v. Morgan,* 141 N. C., 732.

(545)

STATE v. WILLIAM TUCKER.

Indictment—Perjury—Judge's Charge.

On the trial of an indictment for perjury, it became material for the jury to know whether a certain note was given for a horse or for the purchase of land; and the court declined to charge the jury as asked by the defendant, "that if B. sold a horse to H. and took the mortgage to secure him, and that was all the debt he had against the land, it made no difference how the contract was made to lift the mortgage, still in law it was an agreement to pay the debt created for the horse, and that the defendant would not be guilty": *Held*, to be error.

PERJURY, tried at Fall Term, 1877, of HAYWOOD, before *Furches, J.*

In 1872, W. G. Boyd, the prosecutor, sold a horse to William Halcombe for $100. He took a note payable to his mother, Elizabeth Boyd, and Halcombe secured its payment by mortgage on real estate. Boyd sold the land to one Cagle for $125 and gave him a bond for title upon payment of the same. The defendant bought Halcombe's equity of redemption, and also the interest of Cagle under the bond for title. Subsequently, by agreement of all the parties, the defendant paid Boyd a part of the amount due from Cagle, and gave his note, payable to Mrs. Boyd, for $76.50, the balance due upon the note which Cagle gave as the purchaser of the land. Thereupon Boyd surrendered Cagle's note, and Cagle assigned the bond for title to the defendant.

The prosecutor brought an action before a justice of the peace against the defendant for the $76.50, recovered judgment, which was docketed in the Superior Court, filed an affidavit stating that it was recovered upon a note given for land, and that the land was not exempt from execution to enforce its payment, and obtained an order from *Cannon, J.*, directing the clerk to issue an execution and the sheriff to sell the land in satisfaction thereof. And thereupon the defendant ap- (546) plied for an order restraining the sheriff from selling the land, stating in his affidavit that said note was given for the purchase of a horse, as aforesaid, and not for the purchase of real estate, and *Cannon, J.*, granted the order. The perjury assigned was in the statements set forth in this affidavit.

The instruction asked for by the defendant and refused by his Honor, and upon which the case turns, is set out in the opinion. There was a verdict of guilty, and the defendant appealed because of the refusal to give the instruction prayed for; and Tate, solicitor for the State, appealed because his Honor allowed the defendant's motion in arrest of judgment.

Attorney-General for the State.
No counsel for the defendant.

FAIRCLOTH, J. In this case it became material for the jury to know whether a certain note was given for a horse or for the purchase of land, and the evidence was conflicting.

The defendant requested the court to charge the jury "that if Boyd sold a horse to Halcombe and took the mortgage to secure him, and that was all the debt he had against the land, it made no difference how the contract was made to lift the mortgage, still in law it was an agreement to pay the debt created for the horse, and that the defendant would not be guilty," which was declined by the court.

We think this was a proper instruction for the jury, and that the refusal to give it entitles the defendant to another trial. This conclusion renders it unnecessary to consider other exceptions, as they may not arise again.

PER CURIAM. *Venire de novo.*

---

(547)

STATE v. DAVID LANE.

Practice—Appeal by State—Inferior Courts.

1. No appeal can be taken by the State to *any court* from the action of an inferior court in sustaining a plea of former acquittal, although such plea is a mixed question of law and fact and the court erred in not leaving it to the jury.

2. In this State the right of the State to appeal has been recognized as existing in two cases, viz.: (1) where judgment has been given for the defendant upon a special verdict; (2) where a like judgment has been given upon a demurrer to an indictment or upon a motion to quash.

ASSAULT and battery, tried at November Term, 1877, of EDGECOMBE Inferior Court, before *H. C. Bourne, W. T. Cobb,* and *J. J. Battle, justices of the peace.*

The defendant and three others were charged with an assault upon the prosecutor, and upon the trial the defendant Lane pleaded former acquittal. This plea was sustained by the court below, and the State appealed to this Court.

John L. Bridgers, Jr., who prosecuted in the court below, appeared with the Attorney-General for the State.

Fred. Phillips for the defendant.

RODMAN, J. 1. The first question presented is, Could the State appeal to any court from the action of the inferior court which is set forth in

the record? The record proper states that the defendant pleaded a former acquittal and that the plea was considered by the court, and then proceeds: "It is ordered and adjudged by the court that the said plea be and is in all respects sustained." From this judgment the solicitor appealed to this Court. The case, which we consider a part (548) of the record, after setting out the evidence respecting the former trial, says: "The court thereupon instructed the jury that the acts alleged in the second indictment against Lane and others were embraced in the charge contained in the first indictment against Lane, and they need not consider the case as against him at all. The solicitor prayed an appeal to the Supreme Court, and a verdict of not guilty was rendered under the direction of the court." As the record proper shows that a verdict of not guilty was rendered as to the codefendants of Lane, and does not show that any verdict was rendered as to him, we will understand the last quoted paragraph from the case as meaning no more than this, although its more natural sense would seem to be that Lane himself was acquitted.

Without departing from the question under consideration we may say that the judge clearly erred in withdrawing from the jury the finding upon the issue whether the fight for which the defendant had been formerly acquitted was the same with that charged in the indictment then on trial, and in undertaking to decide himself that question of fact, as he seems to have done. The plea of former acquittal is a mixed plea of law and fact, and it must always be left to a jury under instructions from the court to pass upon the fact whether the offense charged against a defendant on trial is identical with one for which he has been formerly tried.

Until lately no case could be found in the English Reports where a writ of error was allowed on behalf of the Crown in a criminal prosecution, and it has not yet been decided that such a writ may lawfully issue, as in the cases in which it did issue the question was not made. No reference is found to it in the older books on criminal law, but the authorities may be found collected in 1 Bennett and Heard's Leading Criminal Cases, 610, in the note to *People v. Corning,* 2 Coms. (N. Y.), 1, and *Commonwealth v. Cummings,* 3 Cush. (Mass.), (549) 212.

From the cases there cited it will be seen that in many of the States it is held that the State has no appeal in a criminal case under any circumstances. In all, or nearly all, it seems to be held that where the right of appeal exists, it is given by statute; and that if it exists at all independently of a statute, it is confined to two cases only: One where the inferior court has given judgment for the defendant upon a special verdict, and the other where it has given a like judgment upon a demur-

rer to an indictment, or upon a motion to quash, which is considered as substantially similar.

In this State it has been recognized as existing in those two cases, but I am not aware that it has been in any others. Thus limited, the right may be defended by reasoning, although not expressly given by any statute, it violates no principle, and can never be used oppressively. Clearly in this State an appeal by the State is not a general right, and if it is claimed in any case other than those mentioned, the claim must be derived from some statute conferring it.

Chapter 154, Laws 1876-77, which establishes the inferior courts, provides for appeals by defendants to the Superior Courts, but it is silent as to any appeal on the part of the State. It is contended, however, that an appeal is given to the State by Article IV, sec. 8, of the Constitution, which says: "The Supreme Court shall have jurisdiction to review on appeal any decision of the courts below upon any matter of law or legal inference." Notwithstanding the broad language of this section, we do not think it was intended to give an appeal to the State from *all* decisions of law in either the Superior or other courts, as it must do if it gives it in this case. To hold that it did would be to deprive the defendant in many cases of the benefit of a sacred maxim of the common law, that no man shall be put in jeopardy twice for the same offense.

(550) It was held in *S. v. Taylor,* 8 N. C., 362 (see, also, *Rex v. Bear,* 2 Salk., 646), that no appeal by the State will lie after a verdict of acquittal, notwithstanding it may be alleged that the judge erred in instructing the jury as to the law. If an appeal did lie in such cases it would or might be very oppressive to persons charged with crime. We are of opinion that as the State is not mentioned in the section cited it was not intended to apply to the State as a party to a criminal prosecution, or to extend its right of appeal. If this construction be wrong, however, the Constitution by section 12 directs the Legislature to provide a proper system of appeals from the inferior courts, and acting under this direction it has provided a system which gives no appeal to the State. We cannot think that this omission was accidental. It seems to me that it was of purpose and, if I may express an opinion, was founded on sufficient reasons of public policy.

2. If the State possessed the right of appeal from any judgment of the inferior court, it seems to be clear that the judgment must at least be one which from its nature may be practically reversed, and the parties put *in statu quo.*

In the present case it does not appear that the court made any decision but that sustaining the plea of former acquittal. By this we must understand that the court held the plea sufficient in law. The error of the court consisted, not in this, but in discharging the jury without requir-

ing them to find any verdict as to the defendant. The defendant has simply never been tried. It may be that the discharge of the jury without any reason for it may prevent the defendant from being put on trial again. In a case of felony it clearly would. *S. v. Alman,* 64 N. C., 364. If the doctrine of "once in jeopardy" applies in cases of misdemeanor, it cannot be evaded by an appeal by the State, which is in fact an appeal from an order discharging the jury. That is such an order as from its nature cannot be reviewed or reversed. (551)

The jury charged with the defendant's case have separated, and the legal effects of their separation cannot be avoided by any decision of this Court that the court below erred in permitting them to separate. The parties cannot be replaced *in statu quo* by any judgment of this Court. The question whether the defendant can be tried hereafter, notwithstanding the discharge of the jury, is not presented. That can arise only if he shall be again arrested.

PER CURIAM. Appeal dismissed.

Cited: S. v. Spurtin, 80 N. C., 364; *S. v. Swepson,* 82 N. C., 542; *S. v. Padgett, ib.,* 546; *S. v. Keeter, ib.,* 548; *S. v. Swepson,* 83 N. C., 586; *S. v. Moore,* 84 N. C., 726; *S. v. Murdock,* 85 N. C., 599; *S. v. Scanlon, ib.,* 601; *S. v. Powell,* 86 N. C., 643; *S. v. R. R.,* 89 N. C., 585; *S. v. Ostwalt,* 118 N. C., 1214; *S. v. Savery,* 126 N. C., 1088, 1089, 1091.

(552)

STATE v. W. S. ENGLAND.

Sufficiency of Indictment—Practice—Withdrawal of Juror—Willful Burning—Evidence.

1. It is not error for a juror to be withdrawn by the court and a mistrial entered in a criminal action, upon the motion of the solicitor, where the indictment is defective; and in such case the defendant can be tried upon another indictment.

2. An indictment for burning a stable, under chapter 228, Laws 1874-5, which omits to allege that the burning was done with "an intent to injure or defraud," is defective.

3. An indictment for such offense under chapter 32, sec. 6, Battle's Revisal, which omits to allege that the burning was in the "night-time," is defective.

4. On the trial of an indictment for burning a stable, evidence that the measurement of certain tracks leading from the stable towards defendant's house had been applied to the foot of the brother of the defendant who had been at first arrested for the offense, and that the measurement did not correspond, is not admissible.

STATE *v.* ENGLAND.

INDICTMENT for burning a stable, tried at August Special Term, 1877, of BURKE, before *Schenck, J.*

After the jury were impaneled the solicitor for the State discovered that the bill of indictment was defective, and moved the court to withdraw a juror and order a mistrial, insisting that as the offense charged was a misdemeanor, and as the defendant upon conviction would have a right to have judgment arrested, the court should allow the motion. His Honor being of the same opinion, withdrew a juror and a mistrial was entered. A new indictment was thereupon preferred against the defendant upon which he was tried. On this trial the defendant objected to the admissibility of certain evidence, which sufficiently appears
(553) in the opinion of *Mr. Justice Bynum.* Verdict of guilty. Judgment. Appeal by the defendant.

Attorney-General for the State.
A. C. Avery for the defendant.

BYNUM, J. The principle is admitted that no person shall be subject for the same offense to be twice put in jeopardy of life or limb, and upon the same principle no man shall be placed in peril of any legal penalties more than once upon the same accusation for any criminal offense whatever. But there is no jeopardy and no peril where the indictment upon which he has been charged is defective. 4 Coke, 44; Whar. Cr. Law, secs. 587, 588.

The prisoner in our case was put upon his trial; and the jury impaneled and charged with his case, when upon the suggestion of the prosecuting officer that the indictment was defective, a juror was withdrawn by direction of the court and a mistrial had, and the prisoner was afterwards tried and convicted upon another indictment for the same offense. If, therefore, the first indictment was so defective that no judgment could have been pronounced upon the prisoner in case of his conviction, it was proper to put him upon his trial upon another and sufficient indictment. We think the first indictment was insufficient. It was founded upon one of two statutes, the act of 1868, or the act of 1874-5. If the first indictment was under Laws 1874-5, ch. 228, it was insufficient, because it did not allege the burning to have been done with an "intent to injure or defraud" specified in the act as a material part of the offense. If it was framed under the act of 1868-69, Bat. Rev., ch. 32, sec. 6, it was defective, because it did not charge the burning to have been in the "night-time," which fact it was necessary to charge and prove. The indictment was therefore bad, and it was not error to make a mistrial and send another bill.

A more serious question is raised upon an exception to evi-
(554) dence upon the trial. It was in proof by the State that a bad

feeling existed between the prosecutrix and Joseph England, a brother of the prisoner, who had been at first suspected and arrested for the offense. It was a case of circumstantial evidence. Tracks were found near, and leading from the stables in the direction of the prisoner's house. Several witnesses measured these tracks, and took the measure upon a stick. One Morris, a witness for the State, testified that he applied this measure to Joseph England's foot. The solicitor then asked the witness if it corresponded with the tracks. The question was objected to by the prisoner, but was allowed by the court, and the witness answered that the measure did not so correspond. This was error. The evidence was *inter alios acta,* and inadmissible. There was no allegation by the prisoner that his brother Joseph committed the offense, and no proof was offered by him tending that way. The proposition of the State is simply this: A. did *not* commit the offense; *therefore,* B. *did.* It is impossible to see how evidence tending to establish the innocence of A. tends to establish the guilt of B., except in that very remote degree that it lessens, by one, an indefinite number, some one of whom might have been guilty. For anything that appears, Joseph England might have been one out of an hundred or more who could have committed the offense as well as he. Such evidence is too remote, illusory, and uncertain to be submitted to a jury. The evidence had no legal tendency to establish the guilt of the prisoner, though it was evidently introduced and used for that purpose. But it is unnecessary to enlarge, as the question has been so recently discussed in many analogous cases, where the same principle has been decided. *S. v. Davis,* 77 N. C., 483; *S. v. Bishop,* 73 N. C., 45; *S. v. White,* 68 N. C., 158; *S. v. Duncan,* 28 N. C., 236; *S. v. May,* 15 N. C., (555) 328.

PER CURIAM. *Venire de novo.*

Cited: S. v. Hill, 79 N. C., 658; *S. v. Wright,* 89 N. C., 509; *S. v. Lee,* 114 N. C., 846; *S. v. Pierce,* 123 N. C., 747; *S. v. Marsh,* 132 N. C., 1004; *S. v. Millican,* 158 N. C., 621.

STATE v. ALLISON BROWNING.

Practice—Judge's Charge—Expression of Opinion as to Facts.

1. It is a violation of the act (Bat. Rev., ch. 17, sec. 237) for a judge *at any time* in the progress of a trial (as well as during his charge to the jury) to express an opinion as to the weight of evidence or to use language which, fairly interpreted, would make it reasonably certain that it would influence the minds of the jury in determining a fact.

2. In such case, however, unless it appear with ordinary certainty that the rights of either party have been in some way prejudiced by the remarks or conduct of the court, it cannot be treated as error.

INDICTMENT for burning a stable, tried at Fall Term, 1877, of ALEXANDER, before *Cloud, J.*

It was in evidence that in March, 1877, a stable and mules therein, the property of Wesley Morrison, were consumed by fire, and that soon after the burning, tracks of a peculiar character were discovered in the field where the stable was situated. Several witnesses swore that they were acquainted with the tracks of the defendant, and in their opinion the tracks in said field were those of defendant. It was in evidence that the defendant's left leg was 1½ or 2 inches longer than his right, and there was much other evidence on the part of the State and the defendant touching the identification of the tracks.

The counsel for defendant in his argument to the jury said: "If the witnesses for the State are to be believed, it was not Browning (556) who burned the stable or made the tracks in the field, for they swore that the steps made by the left leg were the shortest (of which there was evidence), whereas it was to be inferred that if the defendant's left leg was the longer, the defendant must make the longest step with that leg." His Honor, interrupting, said: "I thought you were going to ask Dr. Carson how that was, while you had him on the stand, but you didn't do it." Counsel: "I did not do it because I thought it was self-evident." His Honor: "I am not sure about that." This colloquy constituted the basis of the defendant's exception. Verdict of guilty. Judgment. Appeal by defendant.

R. F. Armfield, who prosecuted in the court below, appeared with the Attorney-General for the State.

G. N. Folk for the defendant.

FAIRCLOTH, J. The defendant made two exceptions, but properly abandoned one of them in this Court, and we do not think he is entitled to a new trial on the other. The evidence of tracks entered into and became material on the trial. It was proved that the defendant's left leg was 1½ or 2 inches longer than the other, and there was evidence tending to show that his left step was longer than the other, and there was evidence that the left step of the track seen in the field was shorter than the right step. Whilst defendant's counsel was arguing that the longer leg would make the longer step, his Honor said: "I thought you were going to ask Dr. Carson how that was when you had him on the stand, but you did not do it," and the counsel said he did not do so because he thought it was self-evident, to which his Honor replied, "I am not sure about that," and defendant excepted.

It is urged that the language of the judge in a colloquy between himself and the counsel in the presence of the jury was a violation of the act of 1796, Bat. Rev., ch. 17, sec. 237. Whilst the act in (557) terms only forbids that the judge shall give an opinion "whether a fact is *fully* or *sufficiently* proved," still it is the accepted and settled construction that he shall give no opinion on the *weight* of the evidence; and whilst the inhibition is limited to the occasion of giving a charge to the jury, yet if at any time in the progress of the trial the judge should express an opinion on the weight of the evidence, or use language which fairly interpreted would make it reasonably certain that it would control or influence the minds of the jurors in determining a fact, it would be a violation of the act. It is not insisted that his Honor failed to collate and submit the evidence in a proper manner. It is only claimed that he erred in intimating a doubt to the counsel, not to the jury, in regard to the conclusion which the counsel seemed to think was self-evident, to wit, that the longer leg would make the longer step; but we cannot see with any degree of certainty that the remark was calculated to influence the jury prejudicially to the defendant. At most, it was only the expression of a doubt on the weight of the evidence. In most cases in the course of the trial it becomes necessary for the judge to pass upon and decide collateral questions of fact, and such decisions taken abstractly and without their proper connection with other things, *might* seem to be an opinion upon those matters belonging exclusively to the jury; but it must be presumed that their true import and bearing are understood by the jury, and unless it appears with ordinary certainty that the rights of the prisoner have been in some way prejudiced by the remarks or conduct of the court, it cannot be treated as error. Let this be certified, that the court below may proceed according to law.

PER CURIAM. No error.

Cited: S. v. Debnam, 98 N. C., 719; *Williams v. Lumber Co.,* 118 N. C., 934; *S. v. Robertson,* 121 N. C., 555.

(558)

STATE v. M. C. DIXON AND ANOTHER.

Practice—New Indictment—Several Defendants and Separate Defenses. Discretionary Power of Court.

1. In the prosecution of criminal actions, the solicitor is not restricted to the first bill of indictment found, but may at any time before entering upon the trial send another bill to the grand jury and require the defendants to answer that.

2. On the trial of a criminal action, where there are two or more defendants, and their defenses are separate and antagonistic, the court must regulate the order and manner in which the defenses are to be presented, and the exercise of such discretion is not reviewable in this Court.

AFFRAY, tried at Spring Term, 1877, of GUILFORD, before *Cox, J.*

The defendants, M. C. Dixon and J. B. Gretter, were indicted for an affray and put upon trial on a new bill substituted for that upon which they had been arrested, and differing from the first only in the order in which their names appeared on the bill. When the evidence offered for the State was concluded, the court directed the defendant Dixon to introduce and examine his witnesses, and then the other defendant to do the same. Some of the evidence offered by the defendant Gretter tended to the inculpation of Dixon, and the latter was offered an opportunity to meet and rebut it, which was declined. The jury found both defendants guilty and the court pronounced judgment, from which Dixon appealed.

Attorney-General for the State.
J. A. Gilmer and J. T. Morehead for defendant.

SMITH, C. J., after stating the facts as above: We find nothing in the conduct of the cause of which the appellant can rightfully com-
(559) plain. The solicitor is not restricted to the first bill, but may at any time before entering upon the trial send another bill to the grand jury, and require the defendants to answer that. It is equally plain that where several persons are charged, whether they unite in a common defense, or as in this case where their defenses are separate and antagonistic, the court must regulate the order and manner in which the defenses are to be presented; and the exercise of this discretion cannot be reviewed in this Court. But as far as any rule of practice is to be found, it was observed in this case by calling on the defendant whose name first appeared on the bill, to begin his defense. This was done in *Regina v. Barber,* 1 Car. and Payne, 434, where the defendants' counsel were unable to agree among themselves.

PER CURIAM. No error.

Cited: S. v. Respass, 85 N. C., 536; *S. v. Hastings,* 86 N. C., 597; *S. v. McNeill,* 93 N. C., 555; *S. v. Parish,* 104 N. C., 689.

(560)

STATE v. BENJAMIN SMALLWOOD.

Practice—Argument of Counsel—Misconduct of Jury—Mistake of Jury.

1. On the trial of a case in the court below, counsel cannot read to the jury in his argument an opinion of this Court delivered on an appeal from a former trial in the same case, detailing some of the facts of the case as they then appeared.

2. Where a motion is made, upon affidavits, in the court below, to set aside the verdict upon the ground of improper conduct in the jurors, the facts should be ascertained by the court and spread on the record. The Court will not look into the affidavits.

3. If the motion is grounded upon the *mistake* of the jury, this Court can take no notice of such mistake, whether of fact or law; the only remedy is for the court below to grant a new trial.

4. Misconduct on the part of a jury, to impeach their verdict, must be shown by other testimony than their own.

MURDER, removed from Bertie and tried at Fall Term, 1876, of WASHINGTON, before *Moore, J.*

The case is sufficiently stated by *Mr. Justice Bynum,* in delivering the opinion of this Court. Verdict of guilty. Judgment. Appeal by prisoner.

Attorney-General for the State.
Busbee & Busbee for the prisoner.

BYNUM, J. This case has been here once before. 75 N. C., 104. In his argument to the jury the prisoner's counsel offered to read a portion of the opinion of the Supreme Court, delivered in the former appeal, detailing some of the facts of the case as they then ap- (561) peared. This was not allowed, the court remarking, however, that the "counsel was at liberty to read any proposition of law decided by the Supreme Court in this or any other case." The counsel then offered to read the whole of the opinion of the Supreme Court in the case. This was also disallowed, and the prisoner excepted to both rulings. There is no error upon either ruling. The facts as stated in the published reports were not evidence before the jury at all, nor were the inferences of fact drawn and stated by the judge in delivering the opinion of the Court in the former case, and the counsel had no right to refer to them for any purpose. Under the act of 1844, Rev. Code, ch. 31, sec. 57, the counsel had the right to argue the law as well as the facts to the jury, but the facts as deposed to on a former trial and published in the reports were not competent evidence on this trial, and when the counsel began to read any proposition of law in connection with the recital of

facts in the former case, it became the duty of the judge to stop him, as he did. *S. v. Whit,* 50 N. C., 225; *S. v. O'Neal,* 29 N. C., 251.

The next day after the verdict had been rendered and after the jury had separated, three of the jurors joined in an affidavit to the court, the substance of which was that after the jury had retired a part were for conviction and a part were for acquittal and still remained so, after a consultation which lasted all night. Whereupon, Bateman, one of the number, "a man of learning and a former sheriff of the county," suggested that they could recommend the prisoner to the mercy of the court, and that the judge would recommend him for the Governor's pardon. That believing the prisoner had not been proved guilty of murder, yet thinking the weight of evidence was against him, they, as a kind of compromise, agreed to bring a verdict of guilty, upon the conviction
(562) that recommendation for mercy would prevent the prisoner from being hanged. That they did not and do not now believe the prisoner guilty of murder, and that they never would have consented to the verdict had they known the full effect of it, and had they not been fully satisfied that they had effected a compromise whereby they had saved the prisoner from the death penalty; and finally, that in any other sense, the verdict of guilty of murder was not their verdict, and had never been agreed to by them. The court refused to set aside the verdict. In this there is no error. The affidavit is made a part of the case.

1. When a motion is made in the court below to set aside a verdict upon the ground of improper conduct in the jurors, and the motion is founded on affidavits, the Supreme Court will not look into the affidavits. They can only decide upon the record presented to them, and, therefore, if such motion is designed to be submitted to their revision the facts must be ascertained by the court below and spread upon the record. That has not been done in this case. *S. v. Godwin,* 27 N. C., 401; *Love v. Moody,* 68 N. C., 200; *Rhinehart v. Potts,* 29 N. C., 403.

If the motion for a new trial is based, not upon the misconduct, but upon the mistake of the jury in the court below, the Supreme Court cannot take notice of such mistake, whether they find against the facts or the law; because the jurisdiction of this Court is confined to matters of law adjudged by the court below; and to ascertain what matters of law were so adjudged, we look to the case stated. This Court corrects errors of law committed by the judge below, and not those committed by the jury. For errors of the latter kind, the remedy is for the court below to grant a new trial. *S. v. Gallimore,* 29 N. C., 147; *Long v. Gantley,* 20 N. C., 315; *Goodman v. Smith,* 15 N. C., 459; *Reed v. Moore,* 25 N. C., 313.

2. Misconduct on the part of the jury, to impeach their verdict
(563) must be shown by other testimony than their own. This has been

long settled, and for the most convincing reasons, which will readily suggest themselves to all minds at all familiar with the administration of justice through the medium of trial by jury. *S. v. McLeod,* 8 N. C., 344.

No other point in behalf of the prisoner was made or pressed in this Court. Whether his case is a fit one for executive clemency belongs to the appropriate tribunal.

PER CURIAM. No error.

Cited: S. v. Brittain, 89 N. C., 505; *S. v. Royal,* 90 N. C., 755; *Jones v. Parker,* 97 N. C., 34; *Johnson v. Allen,* 100 N. C., 141; *S. v. Bailey, ib.,* 533; *Hinson v. Powell,* 109 N. C., 537; *S. v. Best,* 111 N. C., 643; *S. v. De Graff,* 113 N. C., 696; *S. v. Fuller,* 114 N. C., 894; *Gray v. Little,* 127 N. C., 305.

(564)

STATE v. JAMES LAXTON.

Indictment—Rape—Trial and Incidents—Province of Jury—Evidence.

1. On a trial for rape, the prosecutrix, while testifying as to the circumstances of the crime, hesitated and wept; whereupon the court directed her to proceed, saying: "You need not use language that will shock your modesty": *Held,* not to be error.

2. On such trial the mother of the prosecutrix, while testifying before the jury, held down her head, seemingly much affected, and spoke in a low voice; prisoner's counsel thereupon asked the court to require her to hold up her head and speak louder; the court declined to compel witness to hold up her head, but said that she would be required to speak loud enough to be heard, at the same time remarking to counsel that "some allowance must be made for the woman, as she is overcome with emotion": *Held,* not to be error; such a remark was not an invasion of the province of the jury within the purview of C. C. P., sec. 237.

3. During such trial certain members of the family of the prosecutrix sat within the bar and occasionally wept during the argument of the prosecuting counsel, and withdrew when the prisoner's counsel addressed the jury: *Held,* that any action in the matter was within the sound discretion of the presiding judge, and not subject to review in this Court.

4. On a trial for rape, where the testimony of the prosecutrix was impeached by proof of inconsistent statements made by her on the preliminary trial before a justice of the peace, it was competent for the prosecution, in corroboration, to prove the declarations of such witness on the day following the commission of the crime.

5. An indictment for rape which charges that the prisoner ". . . in and upon one N., in the peace of God and the State then and there being,

violently and feloniously did make an assault, and her, the said N., then and there violently and against her will did ravish and carnally know," etc., is sufficient.

INDICTMENT for rape, removed from Caldwell and tried at Spring Term, 1877, of IREDELL, before *Schenck, J.*

(565) The prisoner was indicted in the following words: The jurors, etc., present that James Laxton, etc., with force and arms in and upon one Nancy L. Barlow, in the peace of God and the State then and there being, violently and feloniously did make an assault, and her, the said Nancy L. Barlow, then and there, violently and against her will, feloniously did ravish and carnally know, against, etc.

The case is sufficiently stated by the *Chief Justice* in delivering the opinion of this Court. Verdict of guilty. Judgment. Appeal by the prisoner.

Attorney-General for the State.

G. N. Folk and R. F. Armfield for the prisoner.

SMITH, C. J. The prisoner is charged with the crime of rape, committed on the body of Nancy Barlow in Caldwell County, in April, 1876. Upon his application the cause was removed to Iredell County, and there, upon the trial, a verdict of guilty was found by the jury and judgment of death pronounced, from which he appeals to this Court. Several exceptions set out in the record were taken by the prisoner's counsel during the progress of the trial, and have been argued before us. We have given them a careful consideration, in view of the important results to the prisoner depending upon the conclusions at which we may arrive.

It appears from the testimony of the prosecutrix, Nancy Barlow, an unmarried girl of 17 years of age, that she was alone on Good Friday night, 14 April, 1876, at the house in which her mother, herself, and other female members of the family resided, the others having left to spend the night elsewhere; that she had just finished her supper

(566) and was putting the glass upon a shelf when she heard the prisoner's voice at the door, calling her, and upon her not answering, repeating the call; that she then went to the door and opened it, when the prisoner seized her by the arm and jerked her out of the house; that in her alarm she exclaimed, "Lord, have mercy! What are you going to do with me?" That the prisoner made no reply, and proceeded to raise her clothes, when, understanding his object, she begged him to kill her with the axe rather than outrage her person, and screamed; that the prisoner put his hand over her mouth and suppressed her cries and forced her down upon a bench that stood near the door outside.

At this stage of the narrative the witness hesitated and wept. The court several times directed her to proceed, and remarked, "You need not use" or "I will not require you to use language that will shock your modesty." The witness then said, "He had his will with me." To this remark of the judge no objection was made at the time by the prisoner's counsel. The witness then proceeded to say that she fainted and became insensible for a time, and when she recovered her consciousness she found herself on the bench, the prisoner in front of her; that she tried to walk to the door and was not able to do so, and the prisoner pushed her in the door; that she remained in the house during the night, sleepless and undressed; and that on her mother's return in the afternoon of the next day, on her knees she communicated all the facts to her. The witness was cross-examined by the prisoner's counsel and the truth of her statements called in question by the manner in which the examination was conducted and the questions propounded to her.

Louisa Barlow, mother of the prosecutrix, introduced by the State, testified that upon her return home Saturday afternoon, she found her daughter in distress, and weeping, and learned from her the particulars of the outrage of the previous night, which she then proceeded to repeat. When the witness came to speak of her daughter's entreaty that the prisoner would take her life rather than violate her person, the witness held down her head and seemed to be much affected and (567) spoke in a low tone. Thereupon the prisoner's counsel asked the court to require the witness to hold up her head and speak louder. The judge said he would not compel her to hold up her head, but would require her to speak loud enough to be heard, adding: "Some allowance must be made for the woman, as she is overcome with emotion." To this remark the prisoner's counsel excepted.

To contradict the testimony of the prosecutrix the prisoner's counsel offered in evidence her examination taken before the justice of the peace before whom the prisoner after his arrest was brought. The solicitor for the State then proposed to prove the account of the matter given by the prosecutrix to her mother after her return home, as concurring with and corroborating her testimony, and as affecting her credit. This, over the objection of the prisoner, was admitted by the court.

It is stated in the case that the mother and others of her family sat within the bar during the delivery of the argument for the State, and occasionally wept when reference was made to the enormity of the crime and its consequences to the prosecutrix, and that they withdrew when the prisoner's counsel were addressing the jury; but no complaint was made or objection offered during the trial, and so far as the court observed, none of these persons were guilty of any improper conduct, nor did their weeping attract general attention.

The exceptions appearing on the record, and which will be understood from the foregoing statement of what transpired at the trial, are few in number, and will be separately considered:

1. The remark of the judge that he would not require the prosecutrix in giving in her evidence to use language that would shock her modesty.

(568) We find nothing in this effort of the judge to maintain the proprieties of the courtroom, and nothing in what he said, of which the prisoner can rightfully complain. Judicial investigations often involve inquiries into matters of a delicate nature, and vulgar words should never be required of a witness where the truth can be conveyed with equal clearness and accuracy in proper and becoming language. It is the duty of the judge to preserve the dignity of the court, and to see that the decencies of life are not needlessly violated.

2. The remark of the judge, when refusing to require the witness Louisa Barlow to hold up her head, "that she was overcome with emotion." We think this exception also untenable. The remark was addressed to counsel, and was only intended to give the reason of the court for not enforcing what seemed under the circumstances a harsh requirement. The emotion of the witness was manifest to the jury as well as to the judge, and had he made the order as requested, it would have been as strong an intimation of opinion that the emotion was assumed, and thus impaired the force of her testimony, as his refusal to make the order indicates a belief that it was real, and thus tends to support her credit. If the refusal is susceptible of a construction unfavorable to the prisoner, it is a consequence incidental to the exercise of judicial functions, and inseparable from jury trials. Had the witness fainted or become sick while giving in evidence, the objection would apply with equal force to the action of the judge in directing a physician to be called in to prescribe for her. But these are not within the purview of the act of 1796, reënacted C. C. P., sec. 237. The act forbids a judge in *giving a charge to the jury* "to give an opinion whether a fact is fully or sufficiently proved, such matter being the true office and province of the jury," and directs him "to state in a plain and correct manner the evidence given in the case and explain the law arising thereon." In the

(569) cases to which our attention has been called in the well prepared brief of the prisoner's counsel, it will be observed that the obnoxious matter is contained in the charge to the jury, or in the judge assuming to decide a fact which should have been left to them. And even in such case it is not sufficient to invalidate a verdict to show that "what the judge said or did *might* have had an unfair influence; or that his words, when critically examined and detached from the context and the incidents of the trial, are capable of an interpretation from which an opinion on the weight of the testimony may be inferred; but it

must appear with ordinary certainty that his manner of arraying and presenting the testimony was unfair, and likely to be prejudicial to the prisoner; or that his language, when fairly interpreted in connection with so much of the context as is set out in the record, was likely to convey to the jury his opinion of the weight of the evidence." *Rodman, J.*, in *S. v. Jones,* 67 N. C., 285.

So it has been held not to be a violation of the act for a judge to say that a witness had given a fair and candid statement and appeared to be credible, when the statement is admitted to be correct; or to commend and eulogize a witness when the case shows the witness was unimpeached. *S. v. Davis,* 15 N. C., 612; *S. v. Harris,* 46 N. C., 190; *S. v. Williams,* 47 N. C., 194.

While we do not wish to be understood as putting a construction upon the act that excludes from its operation the expression of an opinion upon a matter that belongs to the jury made at any time during the progress of the trial and in their hearing, for in such case we think it does apply, yet it is quite obvious from the words of the act that its special object was to prevent the intimation of such opinion in connection with and constituting a part of the instructions by which the jury were to be governed, and when its influence on their minds would be direct and effective. It was this evil that the act was more particularly intended to correct, and it becomes our duty, when its mandate (570) has been disregarded, to set aside a verdict which the opinion may have contributed to bring about. We think the judge did not invade the province of the jury in speaking of the manifest and visible emotion of the witness when called on by the prisoner's counsel to interfere.

3. It is further objected that the judge should not have permitted the witnesses to remain in the courtroom and make demonstrations of feeling calculated to excite the sympathy of the jury and warp their judgment. But he was not asked to order the removal of the witnesses, and if he had been, we are not prepared to say his refusal would have been an error that would entitle the prisoner to a new trial. In the conduct of jury trials much must necessarily be left to the judgment and good sense of the judge who presides over them, and it is not every inadvertence or casual remark which may escape him in his conversation with counsel, or in preserving order and decorum, that is sufficient to invalidate the action of the jury and defeat the ends of justice. We think his action in this matter rested in the sound discretion of the judge, and is not subject to our revision.

4. The prisoner's counsel further insisted that it was error to allow Louisa Barlow to testify to the account of the transaction as detailed to her by her daughter on the day following, in respect of the credit of the latter and as corroborative of her testimony. But this was permitted

only after her testimony had been impeached, and we deem it only necessary to refer to a single case where the competency of such evidence is fully established. *March v. Harrell,* 46 N. C., 329.

5. Nor can the motion in arrest of judgment be allowed. The indictment in form embodies the averments necessary to constitute
(571) the offense, and the verdict ascertains them to be true. The exceptions are overruled.

PER CURIAM. No error.

Cited: Jones v. Jones, 80 N. C., 250; *S. v. Mitchell,* 89 N. C., 523; *S. v. Debnam,* 98 N. C., 719; *S. v. Parish,* 104 N C., 693; *S. v. Jacobs,* 106 N. C., 696; *Burnett v. R. R.,* 120 N. C., 517; *S. v. Howard,* 129 N. C., 661; *Meadows v. Tel. Co.,* 131 N. C., 75; *S. v. Exum,* 138 N. C., 614; *S. v. Lance,* 149 N. C., 554.

STATE v. DRURY LONG AND OTHERS.

Indictment—Removing Crops—Repeal of Statute.

1. The repeal of a statute pending a prosecution for an offense created under it arrests the proceedings and withdraws all authority to pronounce judgment even after conviction.

2. The provisions of chapter 283, Laws 1876-7 (which act repealed the statute, Bat. Rev., ch. 64, sec. 15, under which the defendant was indicted), making the removal of crops under certain circumstances a misdemeanor, do not apply to antecedent acts.

INDICTMENT for removing crops, tried at Spring Term, 1877, of GUILFORD, before *Cox, J.*

The defendants, Drury Long, D. C. Long, Stephen Hussey, Linville Wood, and John W. Wood, were charged with removing certain crops in violation of the statute. The facts touching the point decided by this Court sufficiently appear in the opinion delivered by the *Chief Justice.* Verdict of guilty. Judgment. Appeal by defendants.

Attorney-General for the State.

Scott & Caldwell, J. A. Gilmer, and Thomas Ruffin for defendants.

(572) SMITH, C. J. This indictment seems to have been drawn under Bat. Rev., ch. 64, sec. 15, against Drury Long, tenant and lessee of land, the rent of which was to be a share of the crop, for removing

the crop grown on the land without the lessor's consent and without the notice prescribed in the statute, and against the other defendants, as acting under the license of Long and aiding and abetting in the unlawful act. The bill was found by the grand jury at December Term, 1876, of Guilford, and tried at March Term following. The defendant J. W. Wood was acquitted and the other defendants found guilty, and from the judgment rendered against them they appealed to this Court.

The section referred to in Battle's Revisal, as also the two sections immediately preceding, were amended, and others substituted in their place, by an act of the General Assembly ratified 19 March, 1875, Laws 1874-75, ch. 209. Subsequently another act was passed, which was ratified and took effect on 12 March, 1877 (Laws 1876-77, ch. 283), section 8 of which in express terms repeals sections 13, 14, 15, ch. 64, Bat. Rev., and ch. 209, Laws 1874-75, and makes (section 6) the removal of the crop or any part of it from the land on which it is grown, without payment of rent, without the lessor's consent, and without his having five days notice of the intended removal, a misdemeanor. These enactments seem to have escaped the attention of the solicitor.

It is well settled that the repeal of a statute pending a prosecution for an offense created under it arrests the proceeding and withdraws all authority to pronounce judgment even after conviction; and it is equally clear that no aid can be derived from the last enactment, which is necessarily prospective only in its operation, and under the Constitution cannot apply to antecedent acts. *S. v. Nutt,* 61 N. C., 20; *S. v. Wise,* 66 N. C., 120, and 67 N. C., 281. The motion here made in ar- (573) rest of judgment is allowed.

PER CURIAM. Judgment arrested.

Cited: S. v. Williams, 97 N. C., 456; *S. v. Massey,* 103 N. C., 359; *S. v. Biggers,* 108 N. C., 764; *S. v. Coley,* 114 N. C., 883; *S. v. Perkins,* 141 N. C., 798, 808.

PROCEEDINGS IN MEMORY

OF

RICHMOND M. PEARSON

(LATE CHIEF JUSTICE).

IN THE SUPREME COURT,

MONDAY, 7 January, 1878.

On the opening of the Court the Attorney-General announced the death of CHIEF JUSTICE PEARSON, and the Court adjourned in honor of his memory.

Immediately after the adjournment a meeting of the members of the Bar was called, and Hon. A. A. McKoy was appointed chairman, and Mr. George H. Snow secretary.

REMARKS OF JUDGE McKOY ON TAKING THE CHAIR.

Brethren of the Bar:—The mournful intelligence of the death of the late Chief Justice of North Carolina has brought us together for the purpose of doing that reverence to his memory which the man, his high office and great attainments demand of his fellow-citizens, and particularly of his brethren of the legal profession.

As perhaps the greatest common-law lawyer of his age and time—nay, I will leave out the word perhaps, and say that in my humble judgment no greater common-law lawyer lived in his day—his loss will be felt and deeply deplored by those so long accustomed to look for the productions of his brain and pen to illumine their journey along the mazes and labyrinths of paths heretofore marked by no fingerboards, with no guide save principle and no beacon save the lights of legal lore.

A terse and pithy writer, he made clear whatever he would explain.

His loss will be deeply felt by his professional brothers.

To the student of law was he the greatest benefactor. He was in fact the great teacher of the age.

He taught the young to reason, and when once a conclusion was arrived at by the student, it was such a conclusion as satisfied the investigating mind in search of truth and did honor to the teacher who planned and led the young mind into and along the channel of patient thought and thorough investigation.

In the hearts and minds of those to whom he ministered as master and teacher in the great profession which by his great mind he has long enriched, and whose honored round of wealthy gifts he has long enjoyed, and whose high claims to this world's distinctions he has greatly aided to grace and adorn, he will be missed—yes, even more than missed.

His character and force truly displayed themselves in the lecture-room, and no man, however great the grasp of his intellect, but felt and cherished the magnetic thrill which pervaded all the intelligence of his nature when this great master taught.

A system so thorough impressed the student, until I can say, a monument more lasting than a monument of brass has been reared to his memory in the hearts of those gifted men in our dear old State and elsewhere who have been so fortunate as to have been his pupils in legal science.

In Memoriam.

He was fortunate in winning and retaining the respect and veneration of those with whom there was a converse of mind.

He was not of that cast which sought to win save by the light of science and the mastery of mind.

He was what would be termed cold until warmed up by some legal investigation, and I believe I speak truthfully when I say that his memory will be ever cherished by his many students, and the brighter the intellect of the student, the more devoted the mind to the lights of science, the brighter the spot in the student's heart in which Judge Pearson's memory will be enshrined.

That his heart was kind I have evidence personal to myself. That he was charitable, I can from my own experience testify.

Although it was my bad fortune not to be able to avail myself of his generous offer, yet as often as I met in debate those trained under his superior teaching, as often have I bemoaned my sad fate that I was not of his teaching. There are numbers in the State who can testify to his liberality and encouragement of those whose *res angustæ domi* made them sharers of his liberal offers and proffered aid.

His charity sought to develop the man, and not by prodigality to spoil the man. "Come to me, enjoy this opportunity, and pay for it when you can." Thus did he arouse all that was latent in a boy's nature, and with his impress did he send him forth to make of him a lawyer, a citizen, and a man. Could more be said in honor of any man?

But with his honors thick upon him, he has been removed from our midst. Position and honor, however desired, or however showered upon poor human nature, cannot stay the summons which calls us hence.

Amid all earth's allurements, its station, its renown, its wealth and its honor, we are all taught what "shadows we are and what shadows we pursue." "Calm be his rest in his cold dwelling place. Sweet be the repose of his grave and bright his resurrection." To us let this be a warning, for each one in a short time may in the course of nature look for the same summons.

How unsubstantial, how unsatisfying is life with all its brightest treasures poured into the lap of our existence! Does not the heart yearn for something more than this world can bestow? Is not this full proof that "it is not all of life to live nor all of death to die"?

"For it cannot be that earth is man's only abiding place! It cannot be that our life is but a bubble cast up by the ocean of eternity to float for a moment upon its waves and then sink into nothingness." Realize this fact. Let man consider the end of his creation. And when this is thoughtfully and well done, with him will all be well. In accordance with our time-honored custom, let us proceed to such action becoming the great loss sustained by his friends, our State, and our country.

Hon. A. S. Merrimon, after a few preliminary remarks appropriate thereto, offered the following resolutions, which were unanimously adopted:

Whereas the members of the Bar attending the Supreme Court have heard with profound regret of the sudden death of Hon. Richmond M. Pearson, Chief Justice of the Supreme Court of North Carolina; therefore,

Resolved, That the family of deceased be requested to allow his remains to be brought to Raleigh to lie in state in the Capitol for one day.

Resolved, That they tender to the widow and friends of the deceased their sincere sympathy in this their great and irreparable loss.

Resolved, That a committee of five be appointed by the chairman to attend the body of the deceased to Raleigh.

Resolved, That a committee of six be appointed by the chairman to prepare suitable resolutions expressive of the feeling of the Bar, and to report to a subsequent meeting, and to make such arrangements as may be appropriate to the memory of the deceased.

The chairman appointed on the first committee Hon. W. P. Bynum, Thomas J. Wilson, Henry A. Gilliam, W. B. Glenn, and Robert T. Gray. On the second committee: T. S. Kenan, J. B. Batchelor, F. H. Busbee, T. C. Fuller, A. M. Lewis, and A. W. Tourgee.

The meeting then adjourned subject to the call of the chairman.

ADJOURNED MEETING.

SENATE CHAMBER,
MONDAY, 14 January, 1878.

Mr. Joseph B. Batchelor, for the committee, submitted the following:

Richmond Mumford Pearson, Chief Justice of North Carolina, having died on Saturday, 5 January, 1878, at Winston, on his way from his home to Raleigh, again to preside over the deliberations of the Supreme Court, the officers of that Court and members of the Bar have met to give expression to their feelings at his death and to testify their respect for his memory.

Chief Justice Pearson, the grandson of Richmond Pearson, the elder and fourth son of Richmond the younger, was born in Rowan County, June, 1805. Receiving his primary education from John Mushat, one of the most successful instructors of his day, under the supervision of his uncle, who was a man of distinction, he entered the University at the early age of 15, and graduated in 1823, when only 18 years of age, with the highest honors of his class. Choosing law as his profession, he entered the office of Judge Henderson, and having completed the required course of reading, was admitted to the Bar in 1826. Here his rise was at once rapid and marked. His early career gave evidence of the great abilities which he possessed and of the success which he afterwards achieved. Pursuing his profession with a singleness of devotion which nothing could divert, being a close and diligent student and possessing a strong and discriminating mind, it was soon evident that he would attain its highest positions.

In 1829 he entered public life, representing his county in the Legislature of that year, and was reëlected for the years 1830, '31, and '32. In 1835 he was a candidate for Congress, his competitors being Hons. Abram Rencher and Burton Craige. In this contest he was defeated, Mr. Rencher being the successful man. Looking at his subsequent career, this defeat may be regarded as a fortunate event in his life. By the Legislature of 1836 he was elected one of the judges of the Superior Court of the State, and with-

drawing himself, for life, from the political arena, in which from his character and habits his success was very doubtful, he devoted himself with renewed energy to the discharge of the duties of his office and to the studies appropriate to that profession of which he was destined to reap the highest honors.

He remained on the Superior Court Bench until 1848, when he was elected by the Legislature one of the judges of the Supreme Court, to fill the vacancy caused by the death of Judge Daniel.

In 1858, after the death of Chief Justice Nash, he was chosen Chief Justice, and upon the adoption of the new Constitution in 1868, having received the nomination of both political parties for the office, he was again elected Chief Justice by the vote of the people and continued in office until his death.

Although having more than completed his three-score and ten years, the life of Chief Justice Pearson was comparatively uneventful, and his history will be chiefly read in the judicial history of the State. But if his life presents no brilliant events, rising above the common level, in which he bore a leading part, yet the influence of his vigorous and astute intellect will be long felt in the courts over which he presided, and by the people whose laws he so long administered. And from his law school which he established at Mocksville, soon after his elevation to the bench, and continued at Richmond Hill until his death, went out an influence which, though silent and unseen, yet permeated the length and breadth of the State. Here many who have since risen to distinction at the bar, in the courts, and legislative halls, received their professional education and carried thence minds filled with the legal principles which he taught, and habits of thought and investigation, the sure precursors of future eminence, and always cherished for him, personally, sentiments of the warmest regard and affection.

As a speaker Chief Justice Pearson was never eloquent, but his speeches were marked by strong sense, powerful logic, and full comprehension of his subject. He addressed the reason of his hearers rather than their passions, and sought to convince rather than to move.

As a judge of the Superior Court he was prompt, clear, and firm in his decisions, administering justice with discrimination, yet with the energy of his strong will, and showing that although elevated to the Bench at the early age of 31, the important duties of the office were committed to no feeble hands.

To the discharge of the duties of judge of the Supreme Court he brought all the energies of his powerful mind, enriched by habits of study and labor in his profession which have been rarely equaled. Here his peculiar traits showed with their greatest force. Possessed of a strong, penetrating, and astute mind, capable at once of grasping great thoughts and principles, and of perceiving clearly the nicest distinctions, he seemed with a single stroke to cut through a "labyrinth of sophistry and a mass of irrelevant facts," down to the real question at issue, and sustained his conclusions by a force of reasoning which carried conviction to those more given to hesitate and doubt. He was the fifth Chief Justice of the Supreme Court—the successor of Taylor, Henderson, Ruffin, and Nash—honored names which have always stood in the front rank of American jurists, and leaves behind him the reputation of a great judge.

His style, not very elegant, was clear and strong, and his illustrations, though sometimes homely and evincing thereby his familiarity with the

things of common life and thought, gave force to his language and threw light on the point discussed.

He cultivated but few of the lighter graces of life; always simple, plain, and direct in his habits and modes of thought. In society he was without ostentation, and affected nothing that he did not feel; yet many were the acts of kindness done in private, and although soon forgotten by him, were long and gratefully remembered by the recipients.

Judge Pearson was one of the few remaining links which bound us to a class of lawyers now fast passing away. Nearly all his cotemporaries are gone before to join the "invisible throng." Those who remain, "*rari nantes in gurgite vasto*," have retired from the active duties of life, and now in a green and honored old age, at the fireside alone, reënact the scenes and events of the past.

It is not meet that such men should be forgotten. Let us cherish their memory as a precious relic of the past, and transmit it as an heirloom to those who shall succeed us in our honored profession: Therefore,

Resolved, That in the death of Chief Justice Richmond M. Pearson the Bar has lost a revered and honored friend, the Supreme Court an able and valued member, and the State a judge of whose great learning and ability it may justly be proud.

Resolved, That the Attorney-General of the State be requested to move the Supreme Court to order these proceedings to be spread upon the minutes, and that a copy, under the seal of the Court, be transmitted to the family of the deceased, with the assurance of our sincere sympathy in their great loss.

REMARKS OF MR. T. C. FULLER.

Mr. Chairman, the death of a valuable and eminent public servant is a loss to be deplored by the State and demands seemly and proper action at the hands of his former associates.

No fulsome eulogy of our late Chief Justice will be pronounced by me. It would be unworthy of the simplicity which was one of his leading characteristics. He was plain and simple in his manners and tastes, and if it were possible for him to exert a controlling influence over the solemn exercises of this hour, he would prefer the words of soberness and truth to the extravagance and exaggeration of eulogy.

A judge for the greater portion of the last half century, there have been few men who have been more prominent, or commanded to a greater extent the attention of the people of North Carolina, than Chief Justice Pearson; and it will be difficult to fill the place so long occupied by him.

He was a man of good education, but not of the highest culture, and he showed that the highest culture is not essential to the greatest usefulness. His education was sufficient for the development of the strong native powers of his mind, so that he successfully discharged the duties of the high offices to which he was called.

Judge Pearson's reasoning powers were of a superior order, and carefully trained by exact and systematic thought. He was not a reader of many books, and he had but slight regard for decided cases, simply because they had been decided; having thoroughly learned the principles of law, he was never satisfied with a conclusion which was not drawn from the "reason of

the thing." He seized the strong points of the question under investigation and presented his views plainly, logically and directly.

Having learned from his favorite author, Lord Coke, that "the law is so jealous a mistress that he who would serve her must have no other," he devoted himself so exclusively to the study of the law, both its science and practical administration, that for years it has been conceded he was the grandest common-law lawyer this State has ever produced.

His judicial opinions, spread over many volumes of our reports, will be the most lasting monument of his claim to greatness. Of these I will not speak further now, either to discuss their merits or compare them with the opinions of others; let those who write history do this, and assign to him his proper place among the ablest judges of the land.

My acquaintance with Chief Justice Pearson commenced twenty-three years ago, when I entered his school as a student of the law. I knew him in the private relations of life. I learned to love him while living, and I revere his memory.

His *students* had for him feelings of attachment, which were born of the knowledge that his virtues were far greater than his faults. There are many men in North Carolina who know that though Judge Pearson was apparently cold, though his manners were rather rough and uncouth, yet his heart was warm and his impulses were generous. That while he was not lavish in his benefactions, he did many acts of real kindness which were only known to himself and the recipient. He did not give indiscriminately and to clamorous mendicants, but he helped the deserving to place themselves beyond the need of aid, and the number is not small of those who have become useful and honored citizens through his generosity.

Judge Pearson was a man of strong and positive character; if he did not easily forgive an injury, he never forgot a favor.

I remember a young man who was treated with the utmost liberality and kindness by Judge Pearson because the young man's father had stood his security for a small amount when he was a penniless and briefless young lawyer, and in my own case he proved himself "a friend in need—a friend indeed."

But he is gone. We all soon must follow him. If he had faults let them be buried with him, but let us remember only his great public services and his virtues, trusting and believing that other men and other times will do full justice to his character.

REMARKS OF MR. C. M. BUSBEE.

Mr. Chairman, I cannot permit this occasion to pass without adding a word to what has been said in memory of the late Chief Justice. We have heard this morning eloquent tributes to his memory. Gentlemen have spoken of him as a lawyer and a judge—of his acute knowledge of the common law, for he was one of its greatest expounders; of his wonderful ability to dissect an intricate and complicated case and lay bare the points upon which the issue rested; of the clearness of his intellect; of his brilliant legal acumen; of the force of his judicial opinions. In all this I heartily concur. I desire, Mr. Chairman, to speak of him briefly as a *man*.

The analysis of character is at all times difficult, and especially so at a time like this, when we meet to do honor to the memory of a departed friend.

But it seems to me that the salient characteristics of Judge Pearson as a man were his honesty of purpose, his unbending integrity, his inflexible idea of justice, his simplicity, his candor, his severely practical common sense, his conscientious devotion to what he considered his duty. With an exterior sometimes rugged, his heart was as tender as a woman's, and ever prompted him to acts of benevolence and charity.

He was always the friend of young men, and I speak of this because I enjoyed his friendship, despite the fact that when I entered manhood his sun had already passed the meridian and was sinking into the West. In his own early life he experienced the winds of adverse fortune, and he always cherished a sympathetic feeling for a young lawyer struggling to obtain a foothold in his profession. I doubt not that scattered over the State will be found many who in days past received substantial testimony of his sympathy and kindness.

There is another element in his character which was strongly developed. I allude to his abhorrence of hypocrisy and his aversion to anything that savored of what is aptly called "gush." He liked to hear an argument plainly made and without rhetorical embellishment. Perhaps it is mainly due to his long continuance upon the bench that in the arguments before our Supreme Court we hear so infrequently anything that would displease him in this respect.

In his private life his character was peculiarly gentle and attractive. His household gods received his most loyal homage. No parent ever combined more successfully indulgence and justice. He was a devoted father and made of his children companions and friends.

In his public life I believe he always acted from conscientious motives. A man should be judged by his entire life, and not by its isolated circumstances. None of us can hope to go through life without meeting at times hostile criticism. It is sufficient if we have in all our actions the approval of our own conscience. I believe that in whatever he did, either in peaceful or stormy days, he did it with the approval of his own conscience.

I have often thought that it is sometimes good for a man to die. In the presence of death, the jealousies and asperities and tumults of life melt and disappear, and the better, gentler emotions of our nature, like incense, fragrant and purifying, rise around the bier.

But he is gone—he who for twenty years has filled the highest judicial station in the gift of the people of his native State. He had passed man's allotted age of three-score and ten. He died in the public service and with the harness on him—stricken down without warning. Let it be to us a lesson of mortality. And when one great in intellect and renown so dies, the lesson is the more significant, for it teaches us the worthlessness of human ambition and earthly fame.

But in one sense Judge Pearson cannot die; his memory will live as long as North Carolina exists, for his name and genius illuminate with a never-ending luster the pages of her judicial history.

The consolation of this thought should mitigate our sorrow at his death.

> Why weep ye, then, for him who, having run
> The bound of man's appointed years, at last,
> Life's blessings all enjoyed, life's labors done,
> Serenely to his final rest has passed?

In Memoriam.

REMARKS OF MR. JUSTICE READE.

Mr. Chairman:—Of Chief Justice Pearson's parentage, education, and early life. I know little except what is generally known. I shall speak of his characteristics as a man and as a judge.

I had not heard of Judge Pearson until 1836, when he was elected to the Superior Court; and then the representative from my county gave me such an account of him as greatly to interest me. He spoke of him as the finest legal mind in the State.

The first time I met Judge Pearson was at Hillsboro court, in the trial of Jarrett, a slave, for the murder of a half-grown white boy. It had been removed from my county to Hillsboro, because of the popular feeling against the prisoner. A young lawyer assisted the solicitor, and had prepared the case with great care, and made an elaborate argument which seemed to be without flaw. Not a single one of his positions were shaken by the prisoner's counsel, headed by Mr. Graham. And it was apparent that the jury were ready to convict, and that the crowd demanded it. When Judge Pearson came to charge the jury he paid the argument of the young gentleman a handsome compliment for its order and force, and then took it up point after point, and left him nothing to stand upon. And the jury found only man-slaughter.

This was characteristic of all his charges. They were so plain that the jury could not misunderstand them, and they were so forcible that no one could resist them.

About the time of his election to the Supreme Court I said to him: "Judge, I am gratified at your promotion, but I am sorry to lose you from the Superior Court." "Yes," said he, "I want to go there to '*rub up*' against Ruffin." A noble ambition to be the peer of a giant!

And right well did he sustain himself. If Ruffin had more *scope*, Pearson had more *point*. If Ruffin had more *learning*, Pearson had more *accuracy*. If Ruffin was larger, Pearson was finer; both were great.

He related to me an incident of his childhood which first excited his ambition. If I remember the details, it was that there was a military display in honor of General Pearson, and his mother took him by the hand and said: "My son, do you understand all this?" And then she explained that it was for some service the General had rendered the country. "And now, my son, I want you to be a great man, and then they will honor you some day." And he said he never forgot it.

He told me that early in life he had three aims—first, to marry and have a happy and prosperous family, and then to make a competent fortune, and then to be Chief Justice; and that he had accomplished all.

He was a simple-hearted, frank, true man. He was as near just what he pretended to be as any man I ever knew. He avoided indirection of every kind, and went right forward. He cared little for form and ceremony—probably too little—and observed only such conventionalities as propriety required; and these he seldom neglected. Distance lends enchantment. It was not so with him. The nearer to him, the greater the charm.

As the presiding officer of the Court, we may never see his like again. The facility with which he caught the facts and points of law was simply amazing. I believe the profession will bear me out in saying that oftener than otherwise, at the conclusion of the reading of the record, he under-

stood the case better than the counsel. This sometimes made him a little impatient with counsel, but the profession knew the cause, and in admiration for the mind, forgave the manners.

In his intercourse with his associates it is not necessary that I should say that in the thirteen years during which I sat by him there was never a fault; but I do say there was never anything worth complaint.

I believe that I express the opinion of the profession when I say that his opinions are as able as those of any judge who ever sat upon our Court. And yet I concede that a number of them have not been popular. How could they be? Before the late war he was always a strong Union man upon principle; he was opposed to the war in its inception. All this was well known. Whenever, therefore, he made a decision during the war which had the effect to keep any one out of the army, or otherwise to militate against it, although it was the decision which any other judge would have made, yet, because it was made by him, it was easy to attribute it to his political views. So, since the war, the Reconstruction Acts were unpopular; and the Constitution of 1868 was unpopular, but still those acts and that Constitution were the fundamental laws under which the State Government had to be administered. A politician or citizen might denounce them, but a judge was sworn to support them. To the common mind, and especially to the ignorant and prejudiced, a decision in support of an unpopular law is itself unpopular. But to the wise it is not so. They know that a judge can say only what the law is, and not what it ought to be.

After these prejudices are buried, as he is buried, and these decisions are considered simply as judicial expositions of the law, they will stand side by side with the ablest of his life.

For the last ten years, perhaps, no man in the State has been more severely criticised. How did he bear himself under these popular complaints? He stood as Gibraltar stands. Just as the billows break against Gibraltar, so the billows of popular rage broke against him, with this difference; that Gibraltar has neither nerve nor sensibility, and does not suffer pain, whilst he had the sensibility of a woman. Cherishing the ambition which his mother taught him, he loved praise and coveted public approbation, and keenly felt the slightest censure. He was, however, self-reliant; and conscious of his own rectitude, he never cried out, except as the martyr cries, when every muscle and sinew and nerve crackles in the flame.

With all this strength, had Chief Justice Pearson no weakness? I will not do him, nor you, nor myself the injustice to say that he had none. But not one to reach his heart! Not one, sir! Not one.

If he had a weakness, and soared to fame in spite of it, let not us, who have his weakness without his strength, make the venture.

Our brother rests well! His face in death was as placid as a sleeping child's. If he served his God as he served his country, his reward is sure. And if we be faithful, we shall see him again.

REMARKS OF MR. R. T. GRAY.

Mr. Chairman, I would be false to my feelings of affection for the dead should I forego this opportunity of adding my humble tribute to the virtues and worth of the distinguished jurist whose death has cast a gloom over the tribunal of which he was the honored head, and over the State which he had

so long and so faithfully served. When a great man, who has rendered distinguished public service, passes from the arena of life, it is fitting that proper expression should be made of the public sorrow which the calamity produces, and of the gratitude which the public feels for the benefits it has received from the life and work of the dead.

The esteem in which he, in whose memory these proceedings are had to-day, was held by the people of the State was attested during his life by the manner in which they heaped their honors upon him. Recognizing his ability, at an early age they elevated him to a high and responsible office, whose duties were performed with such fidelity and ability that he was called to a still higher station. And so eminently useful was he regarded in that higher sphere, so valuable to the State was his intellect with its vast and illimitable stores of learning, and so faithful was he in the discharge of his functions, that at the reconstruction, after the war, the people, without regard to party feeling or political affiliations, but with one undivided and concordant voice, recalled him to preside over the highest judicial tribunal in the State. The unanimity with which this was done, and the unquestioning confidence with which the people, and more especially the legal profession, relied upon and accepted his deliverances from the Bench, as if they were the sacred utterances of an oracle, were proof of the esteem in which he was held while living. And now that he is dead, his long and faithful career ended, the trust which the people through their representatives and by themselves confided to him and never withdrew, taken away by the relentless hand of death, we are met to erect, out of the poverty of human language, a monument to his worth and usefulness.

Sir, it was my honored privilege to know the deceased Chief Justice intimately for the last seven years of his life—for nearly two years as a student of his law school and a member of his household, and the remaining years as a friend. The knowledge of his character which I acquired during those years was such as to fill me with the profoundest respect for the exalted powers of his intellect, and an admiration of the many noble qualities of his heart. An hour in his presence sufficed to disclose the possession of the first; the latter, hidden by a somewhat rough exterior, became apparent only after close and intimate association had lifted the veil which interposed between them and strangers' eyes. To the eyes of the world he was a cold, dispassionate man, whose ideas and feelings were concentrated upon and busied with the functions in the temple of law in which he was so devout a worshiper and devoted and accomplished a priest. But to those who knew him intimately and well, that apparent coldness and austerity of manner vanished, and he appeared in his true light as a genial, generous, and warm-hearted man.

As a common-law lawyer he had, perhaps, no superior in this State or in the other States of the Union. He had, by close study of the science of the law and of the old treatises concerning it, acquired such an accuracy in his methods of thought that his knowledge of its principles and the reasons upon which they are founded appeared to be intuitive, and his opinions were accepted almost without question by the legal profession in this State and quoted with the highest commendation in the courts of other States and in England.

As an instructor in law, he was also without a superior. Added to such an extensive and intimate acquaintance with the science, he possessed a

remarkable facility of imparting his knowledge to others, and as has been remarked, many lawyers in this State and abroad owe the knowledge they have of the law, and much of the success they have attained in the practice, to the simple yet clear and thorough manner in which Judge Pearson imparted its principles to their minds. He was a devoted admirer of "Coke upon Littleton," and always impressed upon his students the necessity of studying those commentaries closely and constantly. He attributed much of his own proficiency in the law to the assiduity with which he had studied his favorite author in the earlier years of his life. In Campbell's "Lives of the Lord Chancellors," Lord Eldon relates how Sir Vicary Gibbs, when asked by a student how he should learn his profession, said, "Read Coke upon Littleton." The student replied, "I have read Coke upon Littleton!" "Well, read Coke upon Littleton over again." "I have read it twice over," said the student. "Have you read it thrice?" "Yes; three times over, very carefully." Sir Vicary then said, "Well, you may now sit down and make an abstract of it." Chief Justice Pearson held the same opinion of the merits of the immethodical and quaint yet perspicuous old writer whose inexhaustible stores of erudition seemed, without effort, spontaneously to pour forth.

In this presence, surrounded by the colleagues of the deceased Chief Justice, and by so many eminent lawyers whose long practice in this Court and acquaintance with his legal learning and intellectual powers enable them to appreciate more highly than myself his value to the State, it is unnecessary for me to speak further of the loss which his death has caused to the profession in North Carolina.

It could not be expected that one so long in public life as Judge Pearson was, and occupying the position he held, could altogether escape reproach. Greatness cannot avoid it; it is a concomitant of greatness. No Roman victor ever conquered the enemies of Rome and entered its streets in triumphal march without being the subject of invective and satire; and there is scarcely any position in which a man can be placed, so elevated or sacred, that the poisoned arrows of envy and detraction will not be directed at him. So Judge Pearson did not entirely escape their attempts. His high sense of duty, his clear conceptions of the law, and the inflexible obedience he paid to its requirements, led him to conclusions which were made the ground of severe assaults. In the winter of 1870-71, when his decisions in the well known *habeas corpus* cases were so violently criticised, it happened that I was a student at his law school, and had frequent and full conversations with him upon the subject. He was not a little annoyed at the misconstruction placed upon his conduct and motives. The *law* involved in the matter he was willing to leave to the cool judgment of the profession and the world; but the matters of fact, touching his conduct and motives, he desired should not be misconstrued by the present and succeeding generations. He determined to lay before the Legislature a statement of facts concerning the accusations made against him, and I acted as his amanuensis in the preparation of a memorial which he afterwards concluded not to present. A copy of that memorial I retained, with his permission, and have it in my possession at present. Upon a recent perusal of it, after a lapse of seven years, it appeared to me, as it did when first prepared, a complete vindication of his course and motives. I believe that posterity will vindicate the integrity of his motives, if not the correctness of his decision; nay, more, Mr. Chairman: I have reason to know that many members of the Bar of the State who for a long time disagreed with his conclusions, in their cool and unprejudiced judgment approve, even now, the

wisdom and prudence of his course. I do not say this, prompted by the softening influence of a mere sentiment of grief over the death of the distinguished Chief Justice, or by that tendency of the human heart to forget and apologize for the faults of the dead, but from an honest conviction that even-handed justice requires it. He was courageous in declaring and maintaining what he conceived to be right. He despised sham and pretense at all times and everywhere, and his written opinions, as well as his conduct on all occasions; show what an uncompromising hatred he had for duplicity, fraud, corruption and oppression.

He acted upon his convictions always, and the world cannot fail to accord to him the commendation which his purity of motive deserves.

Sir, in the death of Chief Justice Pearson I mourn the loss, not only of a most brilliant luminary in the legal profession, but of a friend for whom I entertained the warmest affection. I never failed to defend him against assaults while living, and now that he is dead, I cannot withhold the words of praise which the heart prompts my tongue to speak.

REMARKS OF MR. A. W. TOURGEE.

Mr. Chairman, the great Italian poet, speaking of a mighty presence which he met in the mystic realm of departed spirits, uttered the finest tribute which genius ever paid to a kindred nature when he said that "his was a life so round and full that when it rolled out of time into eternity the world knew not how great a void was left until generations had passed away." This thought appears to me peculiarly applicable to him whom we have met to-day, not to mourn, but to honor. Sorrow has no place here. When a young man dies full of strength and promise, we may well mourn the unfulfilled possibilities of his career, we may mark his grave with a broken column. But when after a full, well rounded life of steady, unpretentious labor, in the ripeness of age, with the harness of the world's great battle yet upon him, a great man bows his head beneath the soft, unconscious touch of death, no one should weep. Such a death is alone befitting such a life.

It was not my privilege to know Chief Justice Pearson during the period of which others have spoken, and I had at no time any nearer or more peculiar relation with him than the ordinary familiarity of professional intercourse. I saw him only in the "sere and yellow leaf," and have no right with my limited capacity to attempt to judge therefrom of what he might have been "in the green tree." When I first met him he was already an old man, crowned with honors; occupying the highest judicial position of the State by the unanimous vote of a people even then proud of his character and achievements. I was a young man, a stranger, thrust by a mysterious chance into a subordinate position in the State's judiciary.

I do not base my estimate of his character or life upon what I have seen of him; but I gather it from that wonderful epitaph written year by year by his own hand in the volumes of our reports for more than a quarter of a century; and by that monument, more enduring than brass, which he builded for himself in the professional intellect of the State. I may be pardoned if, from this peculiar standpoint, I view the honored dead in a light somewhat different from that which others have expressed to-day. The fullest knowledge does not always bring the most just appreciation. He who has never missed the sunshine does not realize its full glory. So, too, one who has grown in the shadow of a great life seldom clearly analyzes its characteristics

or fully estimates its worth until the lapse of time allows him to do it in distant retrospection. There are three things which peculiarly impress me in the life of Chief Justice Pearson, studied from the standpoint which I have occupied. The first is the manly unpretentious directness of his character. There was nothing of indirection or uncertainty in his life or purposes. He went at once to the end he had in view. Right or wrong, he was open, positive, and clear. There was no mistaking his thought or design. Friendly or hostile, favorable or unfavorable, he resorted to no subterfuge, sought no concealment, gave no uncertain sound, knew no stratagem. He sometimes revoked, but he never explained, for there was no room for explanation, no possibility of mistake.

His intellectual power and remarkable will are peculiarly testified by his judicial record.

Strength can often be judged only by its results. The hand which deals the mightiest blow is sometimes as delicately fashioned as a woman's, and only by the effect of its stroke displays its power. So, too, intellectual force not infrequently must be judged, not by its apparent volume, but by its effects. Every member of our profession, looking back upon the course of the common law, can count upon his fingers, aye, upon the fingers of one hand, perhaps, the names of those who have veered the course of its decisions, and among these is Richmond M. Pearson.

Not once, but perhaps half a dozen times, he has grappled with the power of precedent and turned aside the thought of the ages. Not alone in his own State, but wherever the theory and traditions of the common law exist. With associates of rare ability upon the Bench, strengthened by that peculiar reverence for the wisdom of the past which is the characteristic of the common-law lawyer, such was the subtle power of his intellect, and so great the pertinacious tenacity of his will, that he has carried them with him out of the beaten track into the new and straighter ways, which his philosophic thought marked out.

The force of character, will, and intellect which enabled him to do this can only be appreciated by the well trained professional mind. Judged by the results of his judicial life, he has well earned the terse encomium, which he himself bestowed upon a predecessor—of being one "whose power of reflection exceeded that of any man who ever sat upon the Bench of North Carolina."

Another thing which has peculiarly impressed his power upon my mind is the wonderful impress which he has left upon the legal mind of the State. That the quiet life so evenly divided between the seclusion of Richmond Hill and the laborious routine of the Supreme Court room, should not only have constituted his name one with which every lawyer of the State conjures with success, but that he should have so molded the professional thought of the entire Bar that a stranger can trace with ease his modes and ideas in almost every argument delivered in our courts, is the highest possible tribute to his intellectual power.

Those who have been thus molded, those whose professional thought has been guided by his master hand, may not now realize the power which has swayed them, may not appreciate the force which has shaped their intellectual life; but when years have passed away and the shadows of the past have gathered about his memory, his lineaments will stand forth like the outlines of a distant mountain, whose greatness we can only grasp when we view it from afar.

In Memoriam.

REMARKS OF HIS EXCELLENCY, GOVERNOR VANCE.

Mr. Chairman, it is a matter of general notoriety that during the last ten years Chief Justice Pearson and myself had politically—not personally—drifted very widely apart, and it is therefore no feeling of political association that induces me to say anything on this occasion. But I recognize the fact that the reputation of a great lawyer and an upright judge is the brightest inheritance of a free people, and I know that just as law is reverenced for its own sake, and its great expounders and administrators are honored by a community, so far it demonstrates its love of liberty and its capacity to maintain free institutions. Hence the appropriateness of this assemblage to-day.

When the maniac Hadfield attempted by shooting to assassinate the King, instead of being torn to pieces by the infuriated mob, or being hurried away to instant death by summary command, he was arrested and quietly thrown into prison; a copy of the indictment against him, with the names of all the Crown's witnesses, was served upon him ten days before his trial, and the splendid genius of Erskine was assigned to defend him. In the opening of his celebrated speech in defense of his client, he said: "My Lords, the spectacle presented here this day places the British Empire on the summit of human glory." And truly it did. It was not her ships of war sweeping every sea nor their cannon thundering into the ears of the greater part of the world. It was not her commerce which enveloped the earth, nor her wealth, power, and civilization which overshadowed the mightiest empires of antiquity; nor yet was it the vastness of those dominions on which the sun never set, that constituted this glory; it was the simple fact, made plain by the spectacle then exhibited, that justice and law had become so supreme that all this power and magnificence were made to ensure a fair legal trial to the humblest man in that realm for attempting the life of the dread sovereign of it all. Such supremacy of the law had its great advocates and judges secured in England. All English speaking communities wheresoever scattered on earth have received this law and this spirit of obedience to its precepts; and we in North Carolina, as joint heirs of this mighty inheritance, have been in the course of our history specially blessed with a dynasty of great lawyers and judges who have been to us at once a shield and a crown of glory—men whose patient labors, guided by the light of genius, traced back the principles of our law to the fountain-springs to ascertain their reason, and ran them forward to their logical conclusions, making their expansiveness and flexibility cover and protect every possible phase and condition of human affairs. One of the very greatest of these illustrious citizens of North Carolina was he whom we have so recently buried. It is most fitting that we should thus commemorate his genius and his learning, and in doing so for him and such as he, we are fostering a spirit which will assist in conserving our civilization and upholding our free institutions.

REMARKS OF JUDGE McKOY.

My brethren, indeed do we belong to a profession which is noted for two things: First, its conservatism; second, its devotion to its bright luminaries called hence by death and its utmost endeavor to surround with a halo the memory of one of its bright lights now numbered with the dead. And while

there might have been a difference of opinion concerning certain acts and the intent of those acting, yet each is desired to bring his tribute and from his own standpoint urge that which he thinks the crowning glory of our departed yet honored dead. No one shall say what flowers shall be selected to make up the bouquet of his fancy. When brought out, so indulgent are we that none seek to reply, whatever may have been his former thoughts, feelings, or prejudices upon a particular subject. But in the fullness of his heart each lays the tribute most worthy in his estimation upon the shrine erected to the memory of him whom they do mourn. This is the teaching of our ennobling profession and its wholesome conservatism. It is our proud boast, and long may it be ere one discordant sentiment be uttered in a meeting like this, nor will any come here save to do honor to our departed great. And that we may well complete what has been so happily begun, this meeting now adjourns, and the members of the Bar will proceed in a body to the Supreme Court room, where the Attorney-General will, in accordance with our resolutions, present the same to the Supreme Court now in session.

The members of the bar then proceeded to the Supreme Court room, and the Attorney-General, after making appropriate remarks, moved that the proceedings be spread upon the records of the Court, and in granting the motion, Hon. E. G. Reade, senior justice, presiding, said: "The Court cordially approve the action of the Bar, and it is ordered that the proceedings be spread upon the record."

INDEX

ABANDONMENT OF WIFE.

A husband once convicted of an abandonment of his wife (under Bat. Rev., ch. 32, sec. 119) cannot be again tried for the same offense, he not having lived with her since the original abandonment. *S. v. Dunston*, 418.

ACCOUNT AND SETTLEMENT.

The defendant J. purchased certain lands of G. (sold under a deed of trust), at the request of G., for the benefit of his daughters, with money borrowed with G.'s knowledge at 1½ per cent interest monthly; afterwards a contract was entered into in which J. agreed to resell the land, and that if on such sale he should realize any profit after paying the purchase money, costs, and charges, etc., he would hold the same for the use and benefit of the said children of G.; J. thereafter sold the lands and realized more than sufficient to reimburse himself; for services in relation to the purchase, sale, etc., J. paid an attorney $500. In an action for an account and settlement brought by the daughters of G., it was *Held*, (1) That the sum of $500 was excessive, and J. was entitled to credit for only $200. (2) That under the contract he was not entitled to commissions. (3) That he was entitled to credit for the amount paid as interest at 1½ per cent from the time the money was borrowed to the sale of the lands by him. (4) That he was not entitled to credit for money paid to G. for articles furnished by G. to his daughters while living with him. *Green v. Jones*, 265.

ACQUIESCENCE. See Mortgage Sales, 2.

ACTION. See Guardian Bond, 2, 3; Official Bond, 6; Pleading, 1, 2, 3.

ACTION FOR DIVERTING WATER.

1. A proprietor of land through which a water-course flows has a right to a reasonable use of water, provided he does not by his use of it materially damage any other proprietor of land, above or below. *Williamson v. Canal Co.*, 156.
2. In an action for damages for diverting water from a stream flowing through plaintiff's land and used by plaintiff, brought against the owners of land above, the plaintiff is not required to show his right to use the water by grant or prescription. *Ibid.*
3. The right of the plaintiff in such case to recover damages is not affected by the fact that the defendants gave him notice of their intention, under the provisions of an act of the General Assembly, to drain the swamp above him. *Ibid.*
4. Chapter 129, Laws 1871-2 (re-enacting chapter 78, Laws 1866-7, incorporating the Locks Creek Canal Company), authorizes the draining of the swamp, provides how the advantage accruing to owners of land in the swamp may be assessed, etc., but provides no compensation to any one damaged by the draining: *Held*, in an action by the owner of land below the swamp damaged by the diverting of

ACTION FOR DIVERTING WATER—*Continued.*

the flow of water in a stream running from the swamp through his land, that the plaintiff is entitled to recover damages against the individual members of the corporation acting under the powers conferred in the act, as well as against the corporation itself. *Ibid.*

5. In such case no statutory remedy has been provided for the plaintiff, and his remedy by an action for damages exists as at common law. *Ibid.*

ACTION TO RECOVER LAND.

1. Where in an action to recover land it appeared that the husband of the *feme* defendant had (before the enactment of Rev. Code, ch. 56) purchased land partly with money arising from the sale of real estate belonging to his wife, and had taken title to himself, and thereafter conveyed the land to the plaintiff, who purchased with notice of the wife's interest therein: it was *Held*, that the plaintiff was entitled to recover the possession of the land and its profits for the life of the husband, and in fee to the extent of the residue of the purchase money not the proceeds of the wife's land. *Lyon v. Akin*, 258.

2. In an action to recover land, where both plaintiff and defendant claim under the same person, it is not competent for either to deny that such person had title. *Whissenhunt v. Jones*, 361.

3. Where in such action a defendant is allowed to come in and defend the action as landlord of the original defendants, he cannot object that no notice to quit was given to them. *Ibid.*

4. In an action to recover land and damages for the time the plaintiff has been kept out of possession, damages are recoverable up to the time of the trial. *Ibid.*

5. In an action to recover land, where the verdict of the jury establishes the title of the plaintiff to the land in dispute, but does not find any wrongful act done by the defendant to the land to which title is thus established, the plaintiff is not entitled to recover damages or costs. *Clarke v. Wagner*, 367.

6. On the trial of an issue as to the quantity of land conveyed in a sheriff's deed there was conflicting evidence as to whether a 1,900-acre tract or 950 acres out of the tract had been sold; it appeared that the levy was "upon his (plaintiff's) interest in 950 acres located in Cypress District," etc., and the return of sale was "the 950-acre tract levied on," etc.; the sheriff's deed was for 1,750 acres (leaving out 50 acres) and for 100 acres, and it was in evidence that the sheriff sold it as the plaintiff's interest in 950 acres, and proclaimed at the sale that he would sell all the interest which the plaintiff had in all his land in that district, and that plaintiff, who was present at the sale, knew of the sheriff's mistake, and did not correct it; the jury found that the defendant bought and the sheriff sold the whole interest of the plaintiff in the 1,900-acre tract: *Held*, that the verdict of the jury is conclusive and that the plaintiff cannot recover. *Houston v. McGowen*, 370.

See Adverse Possession, 2; Decree, 3; Evidence, 6; Homestead, 1; Possession; Practice, 24.

ACTION TO VACATE CHARTER. See Corporations, 2.

ADMINISTRATION BOND. See Guardian and Ward.

ADVERSE POSSESSION.

1. From an adverse possession of land for thirty years, the law presumes a grant from the State, and it is not necessary even that there should be a privity or connection among the successive tenants. *Davis v. McArthur*, 357.
2. Where in an action to recover land the plaintiff showed a continuous adverse possession, under deeds defining the land by metes and bounds, from 1815 to 1848, by those successively under whom he derived title, the last nine years of which the possession was held under a deed sufficient in form to pass the estate in fee, and defendant showed a grant from the State in 1848: *Held*, that plaintiff was entitled to recover. *Ibid.*

See Contract, 3; Possession.

AFFIDAVIT. See Arrest and Bail; Executors and Administrators, 2; Jury, 1.

AFFRAY. See Justice of the Peace, 3.

AGENT AND PRINCIPAL. See Contract, 1, 4; Common Carrier, 1; Indictment, 12; Process, 1, 2.

AGREEMENT OF COUNSEL. See Appeal, 2; Private Act.

"AGRICULTURAL BILL." See Construction of Statute.

AGRICULTURAL SUPPLIES. See Crop Lien.

ALIBI. See Judge's Charge, 7.

AMENDMENT. See Pleading, 9, 11; Practice, 17, 22.

AMENDMENT OF PROCESS. See Practice, 4, 5, 6.

ANSWER. See Pleading, 6, 7; Practice, 2, 18; Referee, 3; Statute of Limitations, 6.

APPEAL.

1. No appeal lies to this Court from the refusal of the court below to dismiss an action or to nonsuit the plaintiff. *Crawley v. Woodfin*, 4.
2. On appeals to this Court, if the parties by express agreement appearing upon record extend the time allowed by law for preparing cases for this Court, such agreement will be respected; but if they disagree in regard to time or any material thing to be done, after the time allowed by law has expired, the rule of law governing appeals will be enforced. *Taylor v. Brower*, 8.
3. An appeal lies to this Court from an order of the court below overruling a demurrer. *Commissioners v. Magnin*, 181.
4. No appeal lies from the refusal of the court below to grant a motion to dismiss the action. *McBryde v. Patterson*, 412.

APPEAL—*Continued.*

5. No appeal lies from the refusal of the court below to continue a cause. (Whether, if the discretion of the judge was *plainly abused*, an appeal would lie, *Quære.*) *S. v. Lindsey*, 499.
6. No appeal can be taken by the State to *any court* from the action of an inferior court in sustaining a plea of former acquittal, although such plea is a mixed question of law and fact, and the court erred in not leaving it to the jury. *S. v. Lane*, 547.
7. In this State the right of the State to appeal has been recognized as existing in two cases, viz.: (1) where judgment has been given for the defendant upon a special verdict; (2) where a like judgment has been given upon a demurrer to an indictment or upon motion to quash. *Ibid.*

See Practice, 2, 3, 16, 17, 20, 23.

ARGUMENT OF COUNSEL. See Practice, 26, 28, 33.

ARREST AND BAIL.

In an action for arrest and bail, the affidavit of the plaintiff alleged the existence of a cause of action and the fraud committed by defendants in contracting the debt, and that upon information and belief they had fraudulently removed and disposed of their property: *Held*, to be sufficient to justify the order of arrest. *Paige v. Price*, 10.

ASSAULT AND BATTERY.

Where on the trial of an indictment for an assault and battery, committed upon the prosecutor, a school teacher while engaged in his school, the court charged the jury that "if the defendant went to the schoolhouse for a lawful purpose, and after he got there he brought on the affray by any language or conduct of his own, he would be guilty": *Held*, not to be error. *S. v. Robbins*, 431.

See Imprisonment, 1.

ASSISTING PRISONER TO BREAK JAIL. See Indictment, 1.

ATTORNEYS. See Account and Settlement; Statute of Limitations, 2.

BAILMENT.

A bailee of a horse has no lien upon the animal for expenses incurred in feeding and taking care of it. *Mauney v. Ingram*, 96.

See Contract, 5; Common Carrier, 3; Indictment, 12.

BANK. See Corporations, 1, 2, 3, 4; Practice, 15.

BANKRUPTCY. See Contract, 8, 9.

BASTARDY.

1. On the trial of a prosecution for bastardy, evidence that the prosecutrix had criminal intercourse with another man about the time when in the course of nature the child must have been begotten, and that such intercourse was habitual, is admissible. *S. v. Britt*, 439.
2. On such trial, evidence that the child resembled the man with whom such alleged intercourse was had is also admissible. *Ibid.*

BILL OF EXCHANGE.

1. The intention to assign a fund in the hands of another, founded upon sufficient consideration and expressed by a bill of exchange, operates as an equitable assignment to the payee. *Kahnweiler v. Anderson*, 133.
2. A., living in this State, had a certain fund to his credit in the hands of B. in New York, and on 30 July, 1861, gave to C., for sufficient consideration, a bill of exchange upon B. for the whole amount of the fund; the bill of exchange was immediately indorsed by C. to D. (residing in New York), and mailed to his address, civil war between the States being then raging; the bill of exchange was never received by D., nor had he notice of it until 1866, when he was informed of the remittance by C., who had, however, then forgotten of whom he had purchased the bill; in 1865 the fund in the hands of B. was collected of him by A.; in 1876 C. ascertained, by finding a memorandum upon an old check book, that the bill of exchange had been purchased from A.; D. thereupon, in 1876, made a demand upon A. for payment to him of the fund, which A. declined to pay, and D. thereupon instituted suit against A. for the same: *Held*, that D. was entitled to recover. *Ibid.*
3. In such case the action is properly brought in the name of D. *Ibid.*
4. In such case even if it was negligence upon the part of C. to have forwarded the bill of exchange by mail, A. was contributory to it, and cannot take advantage of it. *Ibid.*
5. In such case D. (independent of the act suspending the statute of limitations) is *prima facie* excused from making a demand on A. for payment until the restoration of peace; and is also excused, under the circumstances, from making a demand on B. *Ibid.*
6. In such case the statute of limitations did not begin to run against D. until after the demand made by him upon A. in 1876, for the amount of the fund. *Ibid.*

BILL OF LADING. See Vendor and Vendee, 3.

BONA FIDE DEBT. See Fraud, 1.

BOND. See Contract, 4; Official Bond.

BOUNDARY. See Evidence, 6.

BUILDING AND LOAN ASSOCIATIONS.

Under a mortgage executed to a building and loan association by a stockholder to secure a loan of money, it was *Held*, that only the *actual* amount loaned and interest thereon and such sum as had been paid by the association for insurance was collectible; and in such case the mortgagor was entitled to be credited with the actual amount paid by him as installments. *Hanner v. B. and L. Assn.*, 188.

BURDEN OF PROOF. See Negligence, 7; Mills, 11.

BURNING MILL. See Indictment, 18; Evidence, 12.

CAUSE OF ACTION. See Contract, 8, 9.

CLAIM AND DELIVERY. See Practice, 18.

CLERK OF SUPERIOR COURT. See Official Bond, 6, 7.

CODICIL. See Wills, 5, 6, 7.

COLOR OF TITLE. See Possession, 3.

COMMISSIONS. See Account and Settlement.

COMMON CARRIER.

1. In an action for damages against a railroad company, where it appeared that the plaintiff had employed one C., who was a depot agent of the defendant, to purchase cotton for him and to hold and ship it under his directions: it was *Held*, that C., in so dealing in cotton for the plaintiff, acted solely as the *plaintiff's* agent, and there was no liability on the defendant from any loss resulting from the failure of C. to perform his duty as such agent. The law does not favor double agencies. *Sumner v. R. R.*, 289.
2. In such case, where it appeared that the plaintiff instructed C. not to ship until he had purchased a certain number of bales, and before C. had acquired the requisite number the railroad was taken by irresistible force into the complete control of the Confederate Government, C. thereafter acquiring the requisite number; it was *Held*, that the court below erred in submitting to the jury an issue as to whether or not it was impossible for the defendant company to ship the cotton. *Ibid.*
3. In such case the defendant was not liable as common carrier, but as bailee, if at all. And the fact that before the requisite number of bales was obtained by C., the railroad was seized by the Confederate Government, is at least evidence to be considered, that the defendant never received the cotton at all, either as bailee or common carrier. *Ibid.*
4. A common carrier (except in the case of an incorporated company disabled by the provisions of its charter) may by special contract bind itself to convey and deliver goods to points beyond its own lines and outside the limits of the State wherein its road lies. *Phillips v. R. R.*, 294.
5. Where various companies form an association and unite in making a continuous line of their respective roads, and collect either in advance at the place of receiving or at the place of delivery the freight due for the entire route, subdividing among themselves, the receiving road becomes responsible for the default of any of the associated companies, and no special contract need be shown. *Ibid.*
6. Where no such association exists and no special contract is made, and goods are delivered to a road for transportation over it, though marked to a place beyond its terminus, the carrier discharges its duty by safely conveying over its own road and then delivering to the next connecting road in the direct and usual line of common carriers towards the point of ultimate destination. *Ibid.*
7. Where on the trial below it appeared that the defendant company received certain freight for transportation to a point beyond its terminus and gave therefor a bill of lading, "Received from L., to be

COMMON CARRIER—*Continued.*

laden on the freight cars, 1 bale bedding. J. F. Phillips, Monroe, La., marks, etc., as per margin (condition of contents unknown), to . . . or assigns at . . . Station," signed by the agent of the defendant, and at the time of receiving such freight the agent said to the shipper that the goods would reach Monroe in good condition and in a few days, etc.: *Held*, that there was no evidence to go to the jury of a special contract on the part of defendant to convey the goods to the point of destination and deliver them to plaintiff there. *Ibid.*

COMPLAINT. See Official Bond, 9, 11; Pleading, 1, 4, 8, 9, 10.

CONDITIONS. See Insurance, 1, 2, 3.

CONFESSIONS. See Evidence, 9, 11.

CONFIRMATION. See Mortgage Sale, 2.

CONSIDERATION. See Contract, 8; Decree, 1.

CONSTABLE. See Indictment, 8; Justice of the Peace, 4.

CONSTRUCTION OF STATUTE.

The privilege tax of $500, levied under the provisions of chapter 274, sec. 8, Laws 1876-77, upon manufacturers, etc., of commercial fertilizers, is valid. *S. v. Norris*, 443.

CONSTRUCTIVE POSSESSION. See Possession, 1.

CONTINUANCE. See Appeal, 5.

CONTRACT.

1. Where E. delivered a note of H. to his son, with instructions to go to H. and buy a mule and enter the price of the mule on the note as a credit, and the son entered into a bargain with R. to buy a horse for $125, with the understanding that if R. did not collect that amount out of the note by a certain time, he was to have his choice to take the horse back or take $125 for him: *Held*, that the legal effect of the transaction was to place the note with R. as security for the price of the horse, and the property of the note remained in E. *Earp v. Richardson*, 277.
2. A subsequent agreement between the son of E. and R., by which it was agreed that R. "might keep the note for the horse," does not alter the relations existing between the parties. *Ibid.*
3. In such case the statute of limitations does not bar, because, (1) R. could not hold the note adversely to E. until after a demand; (2) the statute would not begin to run until after R. had collected the note. *Ibid.*
4. Where the plaintiff constituted the defendants his agents for the sale of sewing machines and took from them a bond conditioned, among other things, that they should return to the plaintiff "all machines that are not sold, in as good order as received": it was *Held*, in an

CONTRACT—*Continued.*

action by the plaintiff upon a bond to recover the contract price of certain machines delivered to defendants which they had offered to return in a damaged condition, but which plaintiff had declined to receive, that the measure of damages was the difference in value estimated upon the basis of the contract in the condition in which they were received by the defendants and their condition when defendants offered to return them. *Gulley v. Barden*, 282.

5. In such case the defendants were but bailees, and until sold, the property in the machines remained in the plaintiff. *Ibid.*

6. A contract founded upon an agreement to stifle or discontinue a criminal prosecution of any kind is void. *Lindsay v. Smith*, 328.

7. Where, for a single consideration, a covenant is entered into to perform two separate acts, one legal and the other illegal, the whole is void. Therefore, where the defendant for a single consideration covenanted, under the penalty sued for, to ditch the plaintiff's land and to stop the prosecution of an indictment pending against him for maintaining a public nuisance: *Held*, in an action for the penalty, that the plaintiff was not entitled to recover. *Ibid.*

8. A parol promise to pay a debt discharged under the Bankrupt Act is a distinct cause of action, and the unpaid prior legal obligation, notwithstanding the discharge, is a sufficient consideration to support it. *Kull v. Farmer*, 339.

9. Where the defendant promised to pay such debt more than three years prior to the commencement of the action and again promised to pay it within three years, and suit was brought upon the latter promise: *Held*, that the plaintiff was entitled to recover. *Ibid.*

See Account and Settlement; Bill of Exchange, 1, 2; Common Carrier, 4, 5, 6, 7; Crop Lien; Judge's Charge, 1, 2; Partnership, 2; Promissory Note; Vendor and Vendee; Verdict, 1; Warranty.

CONTRIBUTION. See Official Bond, 2.

CONVICTS. See County Commissioners.

COOLING TIME. See Homicide, 4.

CORPORATIONS.

1. A bank which issues bills for circulation as money is a *public* corporation; but a bank which beyond a power to contract in its corporate name, has no powers other than those which every other person possesses, must be deemed a *private* corporation. *Attorney-General v. Simonton*, 57.

2. In an action to vacate the charter of a private corporation for the nonuser of its corporate franchises, when the nonuser complained of was an omission on the part of the corporators named in the act of incorporation to organize under it: *Held*, to be insufficient to warrant the relief demanded. *Ibid.*

3. Where the corporators of a private corporation, without having created any shares of stock, or organized in any way, or paid into the corporate fund the capital which the law says shall be paid up, pretend to be incorporated, and hold themselves out to the world as a cor-

CORPORATIONS—*Continued.*

poration, they are estopped, as to those who deal with them on the face of their representations, to deny the existence of the corporation. *Ibid.*

4. The State is not interested in the right of an individual to an office in a private corporation. *Ibid.*

See Action for Diverting Water, 4; Practice, 14.

COSTS.

1. It is within the discretionary power of a court, before which an issue of *devisavit vel non* is tried, to direct the payment of the costs out of the estate. *Mayo v. Jones*, 406.
2. A prosecutor in a peace warrant can be ordered to pay costs where the prosecution is frivolous or malicious; and if he fail to do so, he can be imprisoned therefor. *S. v. Cannady*, 539.
3. Neither a fine nor costs inflicted as a punishment is a *debt* within the meaning of the Constitution in relation to this matter. *Ibid.*
4. The Legislature has the power to prescribe that the prosecutor in a criminal action may be made to pay costs where the defendant is acquitted and the prosecution is frivolous or malicious. *Ibid.*
5. There is nothing cruel or unusual in requiring a prosecutor in such case to pay costs. *Ibid.*

See Action to Recover Land, 5; Official Bond, 6; Peace Warrant, 2; Practice, 9.

COUNTERCLAIM. See Practice, 19; Referee, 3.

COUNTY COMMISSIONERS.

Under the provisions of chapter 196, Laws 1876-7, the commissioners of a county have the power to hire out a man imprisoned in the county jail upon a conviction for fornication and adultery, to his wife, upon her giving bond with sureties for the price. *S. v. Shaft*, 464.

See Official Bond, 8, 10.

COUNTY TREASURER. See Official Bond, 8, 9, 10, 11.

COVENANT. See Contract, 6, 7; Mortgage, 1, 2.

CREDITOR. See Fraud, 2; Homestead, 6; Supplemental Proceedings.

CREDITOR'S BILL. See Practice, 15.

CROP LIEN.

A crop lien to secure agricultural advances (executed under Bat. Rev., ch. 65, secs. 19, 20) is valid *inter partes*, although not registered within thirty days, as required by the statute. *Gay v. Nash*, 100.

DAMAGES. See Action for Diverting Water; Action to Recover Land, 4, 5; Contract, 4; Master and Servant; Negligence; Practice, 9.

DECLARATIONS. See Evidence, 6, 22.

DECREE.

1. A decree by consent is merely a conveyance between the parties, and whether or not it is fraudulent as to creditors must be determined by the consideration. *Rollins v. Henry*, 342.
2. Such decree binds the parties and their privies in estate, but it is open to the latter to impeach it for fraud. *Ibid.*
3. Where on the trial of an action to recover land, the defendant relied upon a decree entered by consent in an action (instituted prior to the action on trial) between the defendant and the person under whom both sides claim title, but entered after the purchase by plaintiffs at execution sale: *Held*, to be error in the court below to refuse to allow to such decree any force.

See Practice, 1.

DEED.

1. Unless the execution of a deed is proved in some manner authorized by statute, its registration will not make the deed evidence; its execution must be proved on the trial. *Rollins v. Henry*, 342.
2. Proof of the handwriting of the grantor is not sufficient (nothing else appearing) to entitle a deed to registration. *Ibid.*

See Adverse Possession, 2; Decree; Fraud, 1, 2; Mortgage and Mortgage Sale; Possession, 4; Purchase Money, 1, 2.

DEMAND. See Bill of Exchange, 5, 6; Contract, 3.

DEMURRER. See Appeal, 3, 7; Official Bond, 9; Pleading, 1, 4, 10, 11.

DEMURRER TO ANSWER. See Practice, 18.

DEPOSITIONS. See Practice, 21.

DESCENT.

Upon the death of an illegitimate child (intestate, unmarried, and without issue), leaving brothers and sisters born of the same mother, some legitimate and others illegitimate, his real estate (under Bat. Rev., ch. 36, Rule 11) descends to his brothers and sisters alike as heirs at law in equal parts. *McBryde v. Patterson*, 412.

DESCRIPTION OF LAND. See Action to Recover Land, 6; Adverse Possession, 2; Will, 9, 10.

DEVISAVIT VEL NON. See Costs; Wills, 11.

DISCRETIONARY POWER. See Costs; Judge's Charge, 2; Pleading, 11; Practice, 22, 25, 29, 32; Trial, 5.

DISSENT FROM WILL. See Widow.

DISSENTING OPINIONS. See *Perry v. Shepherd*, 83, RODMAN, J.; *Miller v. Miller*, 102, READE, J.; *Gatlin v. Tarboro*, 119, BYNUM, J.; *Kahnweiler v. Anderson*, 133, SMITH, C. J., and RODMAN, J.; *Allison v. Robinson*, 222, SMITH, C. J.; *Citizens Bank v. Green*, 247, RODMAN, J.; *Ober v. Smith*, 313, RODMAN, J.; *S. v. Shaft*, 464, SMITH, C. J.; *S. v. Parish*, 492, SMITH, C. J., and RODMAN, J.

DISTURBING RELIGIOUS CONGREGATION. See Indictment, 2, 3, 4, 5, 6, 7.

DIVERTING WATER. See Action for Diverting Water.

DIVISION OF ACTION. See Pleading, 1.

DIVORCE.

1. To entitle a wife to divorce from bed and board under Bat. Rev., ch. 37, sec. 5 (4), the indignity offered by the husband must be *such as may be expected seriously to annoy a woman of ordinary good sense and temper*, and *must be repeated*, or continued in, so that it may appear to have been done *willfully and intentionally*, or at least *consciously*, by the husband to the annoyance of the wife. *Miller v. Miller*, 102.
2. In an action by the wife for divorce from bed and board, where it appeared that the husband, at various times in the absence of the plaintiff, had had carnal intercourse with a female servant in his bedchamber, from which she became pregnant: it was *Held*, that the plaintiff was not entitled to the relief demanded. *Ibid.*

DOUBLE AGENCY. See Common Carrier, 1.

DOWER. See Purchase Money; Widow.

EQUITABLE ASSIGNMENT. See Bill of Exchange, 1.

EQUITABLE TITLE. See Purchase Money, 2.

ESTATE. See Mortgage Sale, 1, 2; Wills, 2.

ESTOPPEL. See Corporations, 3; Homestead, 2; Insurance, 2; Mortgage Sale, 2.

EVIDENCE.

1. On the trial of an action, where it appeared that H., one of the defendants, had purchased the property for the value of which the action was brought, and the liability of S., the other defendant, was in issue: it was *Held*, that letters written by S. to a third person concerning the property and alluding to it as "our stock," etc., were admissible in evidence. *Pepper v. Harris*, 71.
2. Where in an action to recover upon a policy of fire insurance the testimony of P. (one of the parties insured) was attacked by proof of declarations made by him during the progress of the fire, whereupon P., on being recalled, testified that he had made such declarations while excited and confused by the fire, without reflection, etc.: *Held*, that other declarations of P. as to the state of his mind, made to another witness during the continuance of the fire, were contemporaneous with the first and admissible in evidence. *McCraw v. Insurance Co.*, 149.
3. In such case evidence that shortly after the fire the condition of P. was such as to excite the attention of one of his friends, who in consideration thereof advised P. to take a drink of liquor, was relevant and admissible. *Ibid.*

EVIDENCE—*Continued.*

4. The contents of a lost execution, like any other lost writing, may be proved by *parol*. *Rollins v. Henry*, 342.

5. The return to an execution is ordinarily the best evidence of the levy and sale under it; but when the execution has not been returned to the clerk's office, and it, with any return on it, has been destroyed or lost, and it is proved otherwise than from the recital in a sheriff's deed that there was a judgment and execution, the recital in such deed is *prima facie* evidence of the levy and sale (they being official acts of the sheriff), even although the sale was not a recent one. *Ibid.*

6. Where on the trial of an action to recover land a question of disputed boundary arose, and the plaintiff introduced (without objection) certain declarations of the defendant made while he was engaged in chopping a certain line upon the land in dispute: *Held*, that certain prior declarations of the defendant made while he was chopping said line were admissible in evidence on his behalf, although not made in the presence of plaintiff. *Steele v. Wood*, 365.

7. Evidence introduced by the State on the trial of a criminal action for the purpose of impeaching the testimony of a witness for defendant can have that effect only and cannot be considered by the jury as substantive evidence of the defendant's guilt. *S. v. Davis*, 433.

8. On the trial of indictment for forgery, charging the defendant with having forged an order for $60.07, evidence that the defendant had forged an order for *any other amount* is not admissible. *S. v. Smith*, 462.

9. On a trial for larceny, the court below ruled out certain confessions of the defendant offered in evidence by the State, which had been made on the preliminary trial before a justice of the peace, because the defendant had not been put on his guard as required by law; the State then offered in evidence certain other confessions made voluntarily by the defendant shortly after the trial before the justice, without the offering of inducements or threats, which evidence the court below admitted: *Held*, not to be error. *S. v. Needham*, 474.

10. It is not permissible for a witness, introduced to impeach another witness, to be asked concerning him, "From his general character in the neighborhood would you believe him on oath?" *S. v. Caveness*, 484.

11. On a trial for larceny, it was in evidence that the defendant had been charged in his neighborhood with being a thief, and that notice had been given for a neighborhood meeting "to consult as to what should be done with him about his stealing so much"; that prior to the meeting the defendant went to one of the neighbors engaged in the movement and denied that he had anything to do with the stealing which had been going on; that on the day of the meeting the neighbors assembled and sent word to the defendant that if he would leave the State they would not interrupt him, and two days thereafter he left; that after a few months he returned, and in a few hours after his arrival the same neighbors who took part in the first meeting had again assembled; that upon being asked by the prose-

EVIDENCE—*Continued.*

cutor, "Are you not ashamed to try to break up an old man as I am by stealing his sheep and hogs?" the defendant replied, hanging down his head, "The first two hogs you lost I did not get": *Held*, that the confession of the defendant was not admissible in evidence. *S. v. Parish*, 492.

12. On the trial of an indictment for burning a mill, *parol* evidence is admissible to prove the ownership of the property burned. *S. v. Jaynes*, 504.

13. The opinion of an expert, warranted only by assuming the truthfulness and accuracy of what has been testified to by witnesses, is not admissible. *S. v. Bowman*, 509.

14. Such evidence is competent only when founded on facts within the personal knowledge or observation of the expert, or upon the hypothesis of the finding of the jury. *Ibid.*

15. Where on a trial for murder a physician who stated that he had heard the statements of the witnesses as to the circumstances immediately preceding the illness of the deceased, the appearance of the body immediately after death, the condition of the limbs, etc., and could therefrom form an opinion as to the cause of death, was permitted to testify what in his opinion was the cause of the death of the deceased: *Held*, to be error. *Ibid.*

16. On a trial for murder it was in evidence that the defendant H. charged deceased with perjury, adding, "I can prove it. Come up here, M." Whereupon the defendant M. stepped up, when deceased struck him, knocked him on his knees and stamped at him; M. rose up and deceased immediately thereafter staggered back, mortally wounded, one witness stating that both M. and deceased had knives in their hands. It was further in evidence that M. was small, crippled, and one-eyed, and deceased was a strong man: *Held*, that evidence of the character of deceased for violence was admissible. *S. v. Matthews*, 523.

17. The evidence as to H. being that he was cursing deceased, said deceased had sworn to a lie, and called on M. to prove it, and when deceased knocked M. down, H. put his hand in his pocket and said he would "shoot the d—d rascal," or "Stand back from the ———: I am going to shoot him," when his wife caught hold of him and prevented him: *Held*, that what H. said or did before the fight between deceased and M. was not intended to provoke such fight, had nothing to do with it, and ought to have been excluded. *Ibid.*

18. To render the act of killing excusable on the ground of self-defense, the defendant should not only have reasonable ground to apprehend, but also should actually apprehend, either that his life was in imminent danger or that deceased was about to do him some enormous bodily harm, and there must be a necessity for taking life from the fierceness of the assault, etc. In this case the evidence being as above stated: *Held*, that there was no evidence from which the jury might reasonably infer that M. intended or was willing to engage in a fight with deceased. *Ibid.*

19. *Held further*, that the circumstances of the case rebutted the presumption of malice raised from the fact of killing, and it was error in

EVIDENCE—*Continued.*

the judge below to submit the question of murder to the jury, the question as to whether the presumption of malice had been rebutted or not being a question of law. *Ibid.*

20. It is the duty of a judge to state clearly the particular issues arising on the evidence, and to instruct the jury as to the law applicable to every state of the facts which upon the evidence they may reasonably find to be the true one. *Ibid.*

21. On the trial of an indictment for burning a stable, evidence that the measurement of certain tracks leading from the stable towards defendant's house had been applied to the foot of the brother of the defendant who had been at first arrested for the offense, and that the measurement did not correspond, is not admissible. *S. v. England*, 552.

22. On a trial for rape, where the testimony of the prosecutrix was impeached by proof of inconsistent statements made by her on the preliminary trial before a justice of the peace, it was competent for the prosecution, in corroboration, to prove the declarations of such witness on the day following the commission of the crime. *S. v. Laxton*, 564.

See Bastardy, 1, 2; Common Carrier, 3, 7; Decree, 3; Deed, 1, 2; Fraud, 1, 2; Indictment, 2, 3, 4, 5; Insurance, 2, 3; Judge's Charge, 3; Larceny, 1, 2, 4; Partnership, 1.

EXCEPTIONS. See Referee, 2, 3.

EXECUTION. See Evidence, 4. 5.

EXECUTION SALE. See Purchaser, 2, 4; Wills, 8.

EXECUTORS AND ADMINISTRATORS.

1. The insolvency of an executor is not a sufficient cause for requiring him to give bond and, failing in that, for his removal, unless such insolvency was unknown to the testator or occurred after his death. *Neighbors v. Hamlin*, 42.

2. An affidavit upon which an application is based for requiring an executor to give bond or for his removal is insufficient if it states merely a belief that such executor will misapply the funds which may come into his hands; it should set out the facts or circumstances or state the reasons upon which such belief is grounded. *Ibid.*

See Practice, 7, 10, 19; Supplemental Proceedings; Wills, 4.

EXECUTRIX UNDER HUSBAND'S WILL. See Widow.

EXPERT. See Evidence, 13, 14, 15.

FALSE IMPRISONMENT. See Indictment, 8.

FALSE PRETENSE. See Indictment, 9, 10.

FELONIOUS INTENT. See Larceny, 3.

"FIGS." See Indictment, 16.

FINE. See Costs, 3.

FIRE INSURANCE. See Insurance.

"FISH." See Indictment, 13.

FORCIBLE ENTRY AND DETAINER. See Justice of the Peace, 2.

FORFEITURE. See Insurance, 1, 4, 5.

FORGERY. See Evidence, 8.

FORMER ACQUITTAL. See Appeal, 6.

FORMER CONVICTION. See Abandonment of Wife.

FORMER JUDGMENT. See Judgment, 1.

FRANCHISE. See Corporations, 2.

FRAUD.

1. The presumption of fraud arising upon a deed of trust, executed by an insolvent person to secure one of his creditors, conveying a store-house and lot, a stock of goods and the increase of such stock, and containing a provision that the trustor "shall have the privilege of continuing his business for one year," is not rebutted by proof that the debt secured by the trust deed is a *bona fide* debt, and that the insolvency of the trustor was unknown to the trustee and *cestui que trust* at the time of the execution of the deed. *Holmes v. Marshall*, 262.
2. In such case the presumption of fraud arises from the *fact* of the debtor's insolvency and the further *fact* that the trustee and *cestui que trust* are parties to a deed of trust which secures a benefit to the maker, and which conflicts with the rights of creditors. *Ibid.*

See Decree, 1, 2; Homestead, 1; Statute of Limitations, 3, 4, 5.

GENERAL ASSEMBLY. See Official Bond, 3, 4, 5; Private Act.

GENERAL CHARACTER. See Evidence, 16.

GRANT. See Action for Diverting Water, 2; Adverse Possession, 1, 2.

GUARDIAN BOND.

1. A guardian bond is an *official* bond within the meaning of C. C. P., sec. 68(a). *Cloman v. Staton*, 235.
2. An action upon a guardian bond, brought in a county other than the one wherein the bond was given, is triable in such county, unless the defendant moves to remove the action to the proper county. *Ibid.*
3. In such a case a motion by the defendant to dismiss the action should be treated as a motion to remove. *Ibid.*

See Guardian and Ward.

GUARDIAN AND WARD.

1. A minor, J., recovers a judgment against H., administrator *c. t. a.* of McK., her late guardian. He afterwards (28 October, 1871), under a decree, sells the land of his testator to pay debts of estate, J.'s judgment having priority. On 7 November, 1871, H. qualifies as

GUARDIAN AND WARD—*Continued.*

guardian of J., his stepdaughter, giving bond. The purchase money of the McK. land amounts to largely more than J.'s judgment, the wife of H. purchasing much of it. Such of the purchase money as H. actually collects he does not separate from his own or from the administration money, but spends it while in his hands. In his guardian returns he charges himself with the whole amount of the judgment. The administration sureties are solvent: (1) *Held*, that whether the *administrator* wasted the fund or not, it was the *guardian's* duty to collect the judgment, it being collectible; and his failure to collect it was a breach of his guardian bond, for which he and his sureties are liable. (2) *Held further*, that as the guardian did not act in good faith, he and his sureties are liable for the full amount of the debt to the ward, although she might collect it out of the administration bond; that she has her election to sue either set of sureties or both, and to get judgment against both and collect out of one, leaving them to adjust their equities among themselves. (3) The defendants (sureties on the guardian bond) will be substituted to the rights of the ward, and may pursue any equities which they have against the administration sureties or the purchasers of the McK. lands. *Harris v. Harrison*, 202.

2. The administrator of a deceased ward is not entitled to recover, in an action against the administrator of the deceased guardian, moneys which came into the guardian's hands as proceeds of real estate belonging to the ward sold under a decree of court for partition. *Allison v. Robinson*, 222.

3. In such case the heirs at law of the deceased ward are necessary parties to the action, in order that the rights of all interested may be adjudicated in the same action. *Ibid.*

See Petition for Partition; Practice, 11, 12.

HEIR AT LAW. See Guardian and Ward, 3; Wills, 1.

HIRING CONVICTS. See County Commissioners.

HOMESTEAD.

1. Where a debtor had conveyed the tract of land upon which he lived in fraud of creditors, and afterwards the sheriff set apart to him under execution two other tracts of land as a homestead and sold the home tract, and the purchaser acquired possession thereof: *Held*, in an action by the debtor to recover possession of the home tract as a homestead, that he was not entitled to recover. Nor would he have been entitled to recover if the home tract had not been fraudulently conveyed, or conveyed at all. *Spoon v. Reid*, 244.

2. An allotment of homestead under execution, without exception of appeal by the debtor, is an estoppel of record against him. *Ibid.*

3. All property is held subject to the payment of the debts of the owner, except in so far and to the extent only that it has been specifically exempted. *Bank v. Green*, 247.

4. The homestead law does not vest in the owner any new rights of property; it only imposes a restriction upon the creditor that in seeking satisfaction of his debt he should leave to the debtor untouched $500 of his personal and $1,000 of his real estate. *Ibid.*

HOMESTEAD—*Continued.*

5. The income derived from a homestead is not likewise exempt from liability for the owner's debts, and all acquisitions of property derived from such income are subject to sale under execution against the debtor; and the same is true of the natural increase of personal property set apart to the debtor as exempt from sale under execution. *Ibid.*

6. G., being insolvent and having had his homestead of the value of $1,000 set apart to him, and his personal exemption to the value of $275.50 allotted, loaned his wife $300, being the proceeds of the sale of cotton raised on the homestead; with it (and $200 belonging to her) the wife purchased certain other real estate, taking the title to herself; in an action by a judgment creditor to subject the land to the payment of his debt, it was *Held*, that the creditor had a lien upon three-fifths of the land under and by virtue of his judgment against G. *Ibid.*

See Personal Property Exemption; Purchase Money, 1, 2.

HOMICIDE.

1. On a trial for murder, if it appear that the prisoner saw the deceased in his (prisoner's) house with his arms around the neck of prisoner's wife, and thereupon entered the house, when the deceased came at him with a knife, and the prisoner killed him, it is manslaughter. *S. v. Harman*, 515.

2. If A., on entering his own house, is assailed by another with a knife, and thereupon enters into a fight with him, standing not entirely on the defensive, and kills him, it is at the most manslaughter. *Ibid.*

3. If in such case A. stands upon the defensive and does not fight until he is attacked and threatened with death or great bodily harm, when to save himself he kills his assailant, it is excusable homicide, even if A. does not turn and flee out of the house. *Ibid.*

4. On a trial for murder, it was in evidence that the prisoner, the deceased, and others, were at work in a field together, when a dispute occurred between the deceased and a kinswoman of prisoner; that prisoner reproved deceased for troubling her, when deceased remarked, "If you make me mad, I would think no more of going to the house and getting Mr. J.'s gun and shooting you than nothing," and prisoner replied, "If you want to get the gun, you had better go"; that then the prisoner went off and in about half an hour returned with a hatchet behind him, and asked deceased if he meant what he said; the deceased said he did, and thereupon the prisoner struck him with the hatchet and killed him: *Held*, that nothing had occurred to dethrone the prisoner's reason, and his Honor below might have told the jury without any qualification that ample cooling time had intervened. *S. v. Savage*, 520.

5. During the selection of the jury on a trial for murder, several jurors answered that "they had formed and expressed the opinion that the prisoner was guilty," whereupon his Honor said, "that in olden times judges sometimes punished men for expressing opinions in such cases, but the court did not propose to do that; and such expressions might have a tendency to prejudice the community from which jurors were

HOMICIDE—*Continued.*

to be selected, and thereby the prisoner might be seriously damaged. Hereafter it was to be hoped that there will be no such expressions of opinion, in order that fair trials may be had for all who are accused of crime": *Held*, not to be error. *Ibid.*

See Evidence, 15, 16, 18, 19.

HUSBAND AND WIFE.

A husband cannot loan money to his wife, both being insolvent. *Bank v. Green*, 247.

See Action to Recover Land, 1; Divorce; Homestead, 6; Possession, 4; Purchaser, 1.

ILLEGAL CONSIDERATION. See Contract, 6, 7.

ILLEGITIMATE CHILD. See Descent.

IMPEACHING TESTIMONY. See Evidence, 7, 10, 22; Judge's Charge, 3.

IMPRISONMENT.

1. A sentence of imprisonment for five years in the county jail, and a recognizance of $500 to keep the peace for five years after the expiration thereof, upon a defendant convicted of assault and battery, is unconstitutional. *S. v. Driver*, 423.
2. The judgment in such case is reviewable, and the decision of this Court will be certified to the court below, to the end that a regular and proper judgment may be entered. *Ibid.*

See Costs, 2.

INCEST. See Indictment, 11.

INCOME DERIVED FROM HOMESTEAD. See Homestead, 5.

INDICTMENT.

1. An indictment for assisting prisoners to break jail, which does not allege that such prisoners had committed any offense, or state facts or circumstances from which the Court can see that they were lawfully in prison, is fatally defective. *S. v. Jones*, 420.
2. On the trial of an indictment for disturbing a religious congregation, it was in evidence that the defendant, either just before or shortly after the beginning of the services, rose up in the church and began to speak on matters connected with his expulsion from the church, which had occurred a short time previously; that the minister directed him to stop, when he declared he would be heard, and persisted in speaking until he was removed from the house; that he thereupon reëntered and resumed his speaking, notwithstanding repeated remonstrances from the minister, and by his conduct and voice so interrupted the services that the meeting was broken up: *Held*, that upon this evidence the jury were warranted in returning a verdict of guilty. *S. v. Ramsay*, 448.
3. On such trial, evidence as to "before what body the defendant was tried" was inadmissible; also as to "how members of that church

INDICTMENT—*Continued.*

were tried and convicted"; also as to the manner of defendant's expulsion and its propriety; also as to whether the official board or the members of the church had, under its rules, authority to expel. *Ibid.*

4. On such trial a witness introduced by the State testified on cross-examination that he had "taken the defendant to task for sowing the seeds of discord and spreading false views": *Held*, to be inadmissible to further inquire what those false views were. *Ibid.*
5. On such trial it was admissible for the State to ask a witness "if it was a custom in this church for an expelled member to get up on the Sabbath day, just before or at the beginning of the regular service, and make known his grievances." *Ibid.*
6. It is not necessary to constitute the offense of disturbing a religious congregation, that the congregation should be actually engaged in acts of religious worship at the time of the disturbance; it is sufficient if they are assembled for the purpose of worship and are prevented therefrom by the acts of the defendant. *Ibid.*
7. Where on such trial the court charged, at the defendant's request, "that the act of disturbance must be wanton, intentional, and contemptuous," but added "that the acts would be wanton if done without regard to consequences, that is, for some purpose of his own, and with intent to do them whether he thereby disturbed the congregation or not": *Held*, not to be error. *Ibid.*
8. On the trial of an indictment for false imprisonment, where it appeared that the defendant, who was a constable, had arrested the prosecutor under a warrant issued by a justice of the peace, and under the verbal order the justice had put him in jail, where he remained until the succeeding day, when he was brought out, and under another warrant regularly committed: it was *Held*, that the defendant was properly convicted. *S. v. James*, 455.
9. An indictment for obtaining goods, etc., under false pretenses must charge not only the false pretense, but must also contain the negative averment that the pretense was actually untrue. *S. v. Pickett*, 458.
10. An indictment for obtaining goods under false pretenses can be maintained against one who sells and conveys land for a price, by falsely representing it to be free from encumbrances and the title thereto perfect, when the land is in fact encumbered with a mortgage, known to the defendant. *S. v. Munday*, 460.
11. Incest is not an indictable offense in this State. *S. v. Keesler*, 469.
12. In an indictment for the larceny of certain meat belonging to a railroad company, the property was laid in a depot agent of the company, who had possession and control of it for the company, for the use of its hands: *Held*, that the indictment is defective; the property should have been laid in the railroad company, the agent in such case not being a bailee. *S. v. Jenkins*, 478.
13. Fish are not the subject of larceny, unless reclaimed, confined, or dead, and valuable for food or otherwise. *S. v. Krider*, 481.
14. An indictment for larceny which charges the defendant with having stolen "five fish," and fails to allege any of the conditions which render fish the subject of larceny, is fatally defective. *Ibid.*

INDICTMENT—*Continued.*

15. In an indictment against two defendants it is improper to examine each defendant against the other before the grand jury for the purpose of obtaining a true bill against both. *Ibid.*

16. An indictment under Bat. Rev., ch. 32, sec. 20, for the larceny of figs remaining ungathered in a certain field, etc., which fails to allege that they were "cultivated for food or market," is fatally defective. *S. v. Liles*, 496.

17. In an indictment under a statute, where the words of the statute are descriptive of the offense, the indictment should follow the language and expressly charge the described offense, so as to bring it within all the material words of the statute. *Ibid.*

18. In an indictment under chapter 228, Laws 1874-75, it is sufficient to describe the property burned as "one mill." *S. v. Jaynes*, 504.

19. An indictment for burning a stable, under chapter 228, Laws 1874-75, which omits to allege that the burning was done with "an intent to injure or defraud," is defective. *S. v. England*, 552.

20. An indictment for such offense under chapter 32, sec. 6, Battle's Revisal, which omits to allege that the burning was in the "nighttime," is defective. *Ibid.*

21. The repeal of a statute pending a prosecution for an offense created under it arrests the proceedings and withdraws all authority to pronounce judgment, even after conviction. *S. v. Long*, 571.

22. The provisions of chapter 283, Laws 1876-7 (which act repealed the statute, Bat. Rev., ch. 64, sec. 15, under which the defendant was indicted), making the removal of crops under certain circumstances a misdemeanor, do not apply to antecedent acts. *Ibid.*

See Abandonment of Wife; Appeal, 7; Costs, 4; Evidence, 8; Judge's Charge, 3; Practice, 30, 31; Rape; Towns and Cities, 2.

INFANT. See Personal Property Exemption; Petition for Partition; Practice, 11, 12; Process, 3.

INJUNCTION.

1. An action for an injunction lies at the instance of a taxpayer, suing either alone or on behalf of all others similarly situated, to enjoin the collection of an illegal tax by a municipal corporation. *London v. Wilmington*, 109.

2. But before such action can be maintained it must appear that the plaintiff has paid so much of the tax, if any, as is admitted to be due. (Mandamus to require uniform assessment suggested.) *Ibid.*

INSANITY. See Wills, 11, 12, 13.

INSOLVENCY OF EXECUTOR. See Executors and Administrators, 1, 2.

INSOLVENCY OF TRUSTOR. See Fraud, 1, 2.

INSURANCE.

1. In an action to recover on a policy of fire insurance, where it appeared that the policy contained a condition that "when property (insured

INSURANCE—*Continued.*

by this policy) or any part thereof shall be alienated, or in case of any transfer or change of title to the property insured or any part thereof or any interest therein, without the consent of the company indorsed thereon . . . this policy shall cease to be binding upon the company"; and that the plaintiff after the issuing of the policy had mortgaged the property insured, with power of sale, etc.: *Held*, that the policy was thereby forfeited and the plaintiff was not entitled to recover. *Sossaman v. Insurance Co.*, 145.

2. Where in an action to recover on a policy of fire insurance it appeared that the premium for the insurance was not paid in cash, but a note given therefor, and the policy contained a stipulation that "no insurance shall be considered as binding until the actual payment of the cash premium; but where a note is given for cash premium, it shall be considered a payment, provided the notes are paid when due, and it is stipulated and agreed by and between the parties that in case of loss or damage by fire to the property herein insured, and the note given for the cash premium or any part thereof shall remain unpaid and past due at the time of such loss, this policy shall be void": it was *Held* (the said note having been past due and unpaid at the time of the fire), that evidence that the defendant company, by previous transactions with plaintiff and others, had extended similar notes, would warrant a jury in coming to the conclusion that the defendant was estopped from denying an agreement for extension and insisting upon a forfeiture. *McCraw v. Insurance Co.*, 149.

3. If an insurance company intentionally by language or conduct leads its policyholders to believe that they need not pay their premium notes promptly, and that no advantage will be taken of the failure, it is equivalent to an express agreement to that effect, and is a waiver of any forfeiture expressed in the policy therefor. *Ibid.*

See Evidence, 2.

INTEREST. See Wills, 3, 4.

INTERPLEADER. See Practice, 14.

ISSUES. See Common Carrier, 2; Pleading, 6, 7.

JUDGE'S CHARGE.

1. Where on the trial below it appeared that the defendant had executed to one M. eight notes for $125 each, which M. had transferred to plaintiffs before due as collateral, and that the defendants had executed to plaintiffs four new notes (upon which the action was brought), and that the old notes were thereupon delivered by the plaintiff to M., and the agreement under which the new notes were executed by defendants was in dispute: *Held*, to be error for the court to charge the jury, "that if the plaintiffs agreed to deliver to the defendants the eight old notes and failed to do so, they could not recover," there being evidence (testified to on both sides) that after the plaintiffs gave the old notes to M., the defendant and M. made a new arrangement of their matters concerning the old notes, which by consent of all parties, including plaintiffs, were destroyed. The court, in its charge, should have given due force to these facts. *Brunhild v. Freeman*, 67.

JUDGE'S CHARGE—*Continued.*

2. When on the trial of an action the court charged, "that if the jury believe that S. in the course of his dealings and correspondence with the plaintiff gave him reasonable ground to believe, and he did believe, that the property was to be bought and used for the benefit of S., and that the plaintiff parted with his property under that belief, and the property was used for the joint benefit of S. and H., *on S.'s farm*, then S. is affected with liability to the plaintiff for the property as well as H.," etc.: it was *Held*, that it cannot be seen as a conclusion of law that the defendant S. was prejudiced by the use of the expression "S.'s farm," and that it was a matter exclusively within the discretion of the judge below, on a motion for a new trial. *Pepper v. Harris*, 71.

3. On the trial below it was in evidence that a certain witness introduced for defendant had made statements inconsistent with her testimony on the trial. The defendant asked the court to charge, "that the evidence could be considered by the jury only for the purpose of impeaching the testimony of the witness, and not as substantive evidence of defendant's guilt." The court charged, "that if the jury believe from the evidence that the two statements were inconsistent, then it would be for them to say whether her first statement or evidence at the trial was the truth": *Held*, to be error; the court should have guided the minds of the jury as to the application of the impeaching evidence. *S. v. Davis*, 433.

4. On the trial of an indictment for an assault with intent to commit rape, where there was evidence that the defendant (a boy of 15) had been found on the prosecutor's child (a girl of about 6), she being on her back with her clothes up, etc.: *Held*, to be error for the court in its charge to the jury to remark with emphasis, "Why was she on her back? And why was he on her?" as violative of the act, Rev. Code, ch. 31, sec. 130. *S. v. Dancy*, 437.

5. On the trial of an indictment for larceny, containing a count for receiving, etc., the court charged the jury, at the request of the defendant, "that if they believed that the defendant, although he may not have taken the property himself, but finding it at his house, detained it under a claim of right, he cannot be convicted on the second count," but added, "that such claim must be a *bona fide* claim, that is, a claim made in good faith, a claim believed in by himself, and not a mere sham claim or pretense of a claim": *Held*, not to be error. *S. v. Caveness*, 484.

6. On the trial of an indictment for maliciously burning a mill with intent, etc. (under chapter 228, Laws 1874-5), where the court charged the jury, at defendant's request, "that if the defendant burnt the mill with intent to prevent detection of the alleged embezzlement or theft, although he knew incidental injury would be occasioned thereby, the jury should acquit," but added, "that the State was not bound to prove malice or any facts or circumstances besides the unlawful burning, from which the jury might presume malice, and the defendant might negative the same by evidence either of the State's witness or his own": *Held*, not to be error; although the instruction asked ought to have been refused, there being no evidence that he burned the mill with intent to prevent the detection of the embezzlement, etc. *S. v. Jaynes*, 504.

JUDGE'S CHARGE—*Continued.*

7. In such case the court charged that it was "essential to the successful proof of an *alibi* that it should cover the whole time of the transaction in question, and where it fails to do so, it is regarded as the most suspicious evidence; that the witnesses all testified to having retired by 10 o'clock, and it was for the jury to say whether the prisoner might have left or did leave his bed, commit the deed, and return before the alarm of fire was given": *Held*, that the first portion of the charge was erroneous, but the error was cured by the subsequent qualification, that "it was for the jury to say whether," etc. *Ibid.*

8. On the trial of an indictment for perjury, it became material for the jury to know whether a certain note was given for a horse or for the purchase of land; and the court declined to charge the jury, as asked by the defendant, "that if B. sold a horse to H. and took the mortgage to secure him, and that was all the debt he had against the land, it made no difference how the contract was made to lift the mortgage, still in law it was an agreement to pay the debt created for the horse, and that the defendant would not be guilty": *Held*, to be error. *S. v. Tucker*, 545.

9. It is a violation of the act (Bat. Rev., ch. 17, sec. 237) for a judge *at any time* in the progress of a trial (as well as during his charge to the jury) to express an opinion as to the weight of evidence or to use language which fairly interpreted would make it reasonably certain that it would influence the minds of the jury in determining a fact. *S. v. Browning*, 555.

10. In such case, however, unless it appear with ordinary certainty that the rights of either party have been in some way prejudiced by the remarks or conduct of the court, it cannot be treated as error. *Ibid.*

See Assault and Battery, 1; Evidence, 20; Indictment, 7; Larceny, 2; Master and Servant, 7; Trial, 1, 2, 3, 4.

JUDGMENT.

1. A judgment by default rendered by the Superior Court in term-time in an action upon a former judgment or decree, is regular without proof of such judgment or decree being made before the clerk; section 218 of The Code is suspended by the act suspending The Code. Bat. Rev., ch. 18. *Mabry v. Erwin*, 45.

2. A motion made after the expiration of a year to set aside a judgment under C. C. P., sec. 132, cannot be allowed. *Ibid.*

3. The acceptance by a judgment creditor of a promissory note upon a third person in satisfaction of the judgment is a discharge of the judgment, although the note is for a less amount than the judgment. *Currie v. Kennedy*, 91.

4. The requirement that a judge shall sign all judgments rendered in his court is merely directory, and his omission to do so will not avoid the judgment as to strangers; although it might, in connection with other evidence, be a proof that the judgment was fraudulent, or had not in fact been rendered by him. *Rollins v. Henry*, 342.

5. Only a defendant can avoid a judgment for irregularity, and as long as he is content to waive the irregularity, strangers cannot avail

JUDGMENT—*Continued.*

themselves of it collaterally. Therefore, where on the trial below a judgment rendered in another case against one not a party to this action (relied on by the plaintiffs to prove title) appeared to have been rendered without any case having been constituted in court: it was *Held*, that the defendant in the action on trial could not take advantage of the irregularity. *Ibid.*

See Practice, 10, 13; Purchase Money, 2; Stay of Execution, 1.

JUDGMENT AGAINST ADMINISTRATOR. See Practice, 7.

JURISDICTION. See Justice of the Peace; Pleading, 12; Practice, 7; Prohibition.

JURY.

1. Where a motion is made, upon affidavits, in the court below, to set aside the verdict upon the ground of improper conduct in the jurors, the facts should be ascertained by the court and spread on the record. This Court will not look into the affidavits. *S. v. Smallwood*, 560.
2. If the motion is grounded upon the *mistake* of the jury, this Court can take no notice of such mistake, whether of fact or of law; the only remedy is for the court below to grant a new trial. *Ibid.*
3. Misconduct on the part of a jury, to impeach their verdict, must be shown by other testimony than their own. *Ibid.*

See Action to Recover Land, 6; Homicide, 5; Practice, 8, 30; Verdict, 1.

JUSTICE OF THE PEACE.

1. The act of 1876-7, ch. 287, ousting the jurisdiction of justices of the peace in civil actions where none of the defendants reside in the justice's county, does not apply to an action commenced before the passage of the act. *Lilly v. Purcell*, 82.
2. A justice of the peace has no jurisdiction of an action of forcible entry and detainer. *Perry v. Shepherd*, 83.
3. A justice of the peace has final jurisdiction over affrays, on compliance with the required preliminary conditions. *Greensboro v. Shields*, 417.
4. A verbal order of a justice of the peace, sending a prisoner to jail, whether made before or after the examination on the warrant, is not a sufficient authority for the officer to whom the order is given. *S. v. James*, 455.

See Indictment, 8; Practice, 16, 17; Stay of Execution, 1, 2.

JUSTICE'S COURT. See Practice, 16, 17; Stay of Execution, 1, 2.

LANDLORD AND TENANT. See Action to Recover Land, 3; Practice, 2.

LARCENY.

1. On the trial of an indictment for larceny, it was in evidence that lint cotton was stolen from certain bales on the platform of a warehouse; that on the night of the larceny four bags containing cotton like that stolen were found near-by, two of them hidden; that the defendant on

LARCENY—*Continued.*

the same night was seen near the warehouse, behind some wood; that about one month afterwards two bags (containing lint cotton like that stolen) similar in all respects to the bags found near the warehouse were found concealed in defendant's possession: *Held*, that there was sufficient evidence to warrant a verdict of guilty by the jury. *S. v. Patterson*, 470.

2. On the trial for larceny, where the defendant who was charged with stealing a hog contended that certain pork found in his house was part of a hog of his own, and two of his children testified that the defendant had killed a hog of his own the day before the pork was found, it was error for the court to instruct the jury, "that there was no evidence that the hog was the property of any one except the prosecutor." *S. v. Meacham*, 477.
3. To render a defendant guilty of receiving stolen property, etc., he must know at the moment of receiving it that it has been stolen, and he must at the same time receive it with felonious intent. *S. v. Caveness*, 484.
4. Where on a trial for larceny a witness for the State was permitted to testify that in consequence of statements made to him by the defendant, he and defendant went to a certain place in the woods where defendant pointed out to him the stolen property: *Held*, not to be error. *S. v. Lindsey*, 499.

See Evidence, 9, 11; Indictment, 12; Judge's Charge, 5; Practice, 26, 28.

LEGACY. See Wills.

LEGISLATIVE POWER. See Costs, 4; Official Bond, 5.

LEVY. See Action to Recover Land, 6; Evidence, 5.

LIEN. See Bailment; Homestead, 6.

MALICE. See Evidence, 19; Judge's Charge, 6.

MALICIOUS PROSECUTION. See Costs, 2, 4.

MANSLAUGHTER. See Homicide.

MASTER AND SERVANT.

1. If a servant remains in his master's employment with knowledge of defects in machinery which he is obliged to deal with in the course of his regular employment, he assumes the risks attendant upon the use of the machinery unless he has notified the master of the defects, so that they may be remedied within a reasonable time; if he sees that the defects have not been remedied, yet continues to expose himself to the danger, the master's liability ceases. *Crutchfield v. R. R.*, 300.
2. Where both master and servant have equal knowledge of such defects, and the servant continues in the service and in the discharge of his regular duties, each party takes the risk. *Ibid.*
3. If the servant have no knowledge of such defects, he is not thereby exempted from ordinary care and caution; and if he so far con-

MASTER AND SERVANT—*Continued.*

tributes to his injury by his own negligence or want of care and caution as but for such negligence the injury could not have happened, he cannot recover. *Ibid.*

4. Where in the trial of an action for damages against a railroad company for an injury received by the plaintiff while coupling cars, the court declined to charge the jury that "if they believed that the plaintiff knew or had reasonable grounds for believing that the engine used by defendant prior to the time of the injury complained of was not controllable by the engineer, and that the roadbed was in a dangerous condition, and the plaintiff was injured thereby, then the plaintiff was guilty of contributory negligence and the defendant was not liable; and that this was so whether the defendant knew or was ignorant of the condition of the engine or roadbed": it was *Held*, to be error. *Ibid.*

MAYOR. See Towns and Cities.

MISJOINDER OF ACTIONS. See Pleading, 1, 2, 3.

MISTAKE. See Action to Recover Land, 6; Jury, 2; Mortgage, 2.

MISTRIAL. See Practice, 30.

MORAL DEBASEMENT. See Wills, 13.

MORTGAGE.

1. Where a mortgage deed contained a covenant on the part of the mortgagee to allow to the mortgagor in case of foreclosure such sum as he might expend in permanent improvements on the land, "but the same is not to be paid until the mortgage debt, with interest, has been fully paid and satisfied," and the land upon a sale under foreclosure did not bring a sufficient sum to pay off the mortgage debt: *Held*, in an action by the mortgagor against the mortgagee to recover for improvements, that the plaintiff was not entitled to recover. *Phillips v. Holmes*, 191.

2. Where in such action the jury found that it was not intended that a clause should be inserted in the mortgage deed that the plaintiff should only be reimbursed for improvements after payment of the mortgage debt, but did not find that a provision for reimbursing him out of any fund, or that the defendant should become personally liable, was intended to be inserted and was omitted by mistake: it was *Held*, that the deed must be taken as expressing in its terms the true meaning of those who executed it. *Ibid.*

See Building and Loan Association; Indictment, 10.

MORTGAGOR AND MORTGAGEE. See Mortgage and Mortgage Sale.

MORTGAGE SALE.

1. The estate acquired by a mortgagee by a purchase at a sale made by himself under a power in the mortgage deed is not void, but only voidable, and can be avoided only by the mortgagor or his heirs or assigns. *Joyner v. Farmer*, 196.

MORTGAGE SALE—*Continued.*

2. In such case the estate of the mortgagee, being voidable only, may be confirmed by any of the means by which an owner of a right of action in equity may part with it, viz.: (1) By a lease under seal. (2) By such conduct as would make his assertion of his right fraudulent against the mortgagee, or against third persons, and which would therefore operate as an estoppel against its assertion. (3) By long acquiescence after full knowledge. *Ibid.*

3. Where the defendant (mortgagee) purchased the land in dispute through an agent at a sale made by himself under a power in the mortgage deed, the plaintiff (mortgagor) being present and not objecting, and thereafter the plaintiff by agreement retained possession of the land, as tenant of defendant, until certain crops were gathered, when they met by agreement and adjusted the matter, the plaintiff receiving the excess of the amount of sale over the sum due the defendant on the mortgage, less a certain sum allowed the defendant as rent, and yielded possession of the premises to the defendant: it was *Held*, in an action by plaintiff (brought soon after the above settlement) to set aside the sale, etc., that the sale should be set aside, the land resold under the direction of the court, and the proceeds applied to the payment of such amount as should upon an adjustment of accounts be found due the defendant, and the surplus paid to plaintiff. *Ibid.*

MOTION. See Appeal, 5; Guardian Bond, 2, 3; Judgment, 2; Practice, 21, 29.

MURDER. See Evidence, 15; Homicide.

"NATURAL HEIRS." See Wills, 1.

NEGLIGENCE.

1. Where the negligence of the defendant is proximate and that of the plaintiff remote, an action for damages can be sustained, although the plaintiff is not entirely without fault; but if the injury sustained by the plaintiff is the product of mutual or concurring negligence, no action for damages will lie. *Doggett v. R. R.*, 305.

2. Where in an action for damages against a railroad company for the destruction of plaintiff's fence by fire, it appeared that the plaintiff's fence was three-fourths of a mile from the fence which was first ignited by sparks emitted from an engine of defendant, but was connected with it by a continuous line of fence, joined together by intermediate landowners, and that the owner of the fence which originally caught on fire was guilty of contributory negligence: *Held*, that the negligence of plaintiff in connecting with such fence was *remote*, and did not affect his right to maintain the action. *Ibid.*

3. To render a defendant liable in such case, the injury suffered by the plaintiff must be the natural and probable consequence of the defendant's negligence—such a consequence as under the surrounding circumstances of the case might or ought to have been foreseen by the wrongdoer as likely to result from this action. *Ibid.*

4. Where a fire is negligently kindled, and by reason of some intervening cause is carried or driven to objects which it would not otherwise have reached, the destruction of such objects is a remote consequence of the negligence. *Ibid.*

NEGLIGENCE—*Continued.*

5. Where in such action it appeared that the fire caught between 10 and 11 A. M., but had been extinguished, in the opinion of those contending with it who had left it, and thereafter it broke out afresh and was carried to plaintiff's premises: *Held*, that the injury was *remote*, and that plaintiff cannot recover. *Ibid.*
6. In such case, if there was any intervening negligence in the effort to extinguish the fire either by the intermediate landowners or their neighbors who assembled for that purpose, when their endeavors properly executed might have been successful, the plaintiff cannot recover. *Ibid.*
7. In such case, when the danger is imminent, the law imposes the burden upon the plaintiff to show that he was not negligent. *Ibid.*

See Bill of Exchange, 4, 5; Master and Servant.

NEW PROMISE. See Statute of Limitations, 1, 2.

NEW TRIAL.

1. This Court has the power in a proper case to grant a new trial for newly discovered testimony. *Henry v. Smith*, 27.
2. But in such case it must be shown that since the former trial testimony has been discovered which was then unknown, which is probably true, and if it had been produced would have caused a different judgment, which could not have been known in time for the former trial by any reasonable diligence, and that diligence had in fact been used to discover it. *Ibid.*

See Jury, 2.

NOTICE. See Action for Diverting Water, 3; Action to Recover Land, 1, 3; Private Act; Process, 2; Purchaser, 1, 3, 4.

OFFICE AND OFFICER. See Corporations, 4.

OFFICIAL BOND.

1. Where a sheriff executed a bond for the collection of general taxes and another bond for the collection of special taxes: it was *Held*, that the surety on the first bond was liable for any defalcation in the general taxes, and also liable for a ratable part, share and share alike, with the sureties on the special tax bond (as if he had signed the same) for any defalcation in the special taxes. *Cherry v. Wilson*, 164.
2. The surety upon the general tax bond of a sheriff is liable for all taxes collected, whether general or special; and where there is a special tax bond executed by the sheriff, the surety upon the general bond, if the entire defalcation as to the special taxes is collected out of him, is entitled to contribution, share and share alike, from the sureties on the special tax bond as if he had signed the same. *Cherry v. Wilson*, 166.
3. The act of the General Assembly (Laws 1873-4, ch. 4) extending the time of sheriffs wherein to settle their State tax accounts, on condition that three-fourths of the taxes due should be paid within the time required by law, did not operate to discharge the sureties upon

OFFICIAL BOND—*Continued.*

their official bonds, whether the condition of the act was complied with or not, and whether or not such sureties had notice of the extension. *Prairie v. Worth*, 169.

4. Nor can the plaintiffs (sureties on such bond) take any benefit under the resolution of the General Assembly of 6 February, 1874, extending time for the settlement of the one-fourth due, for the reason, among others, that the condition contained in the resolution, that certain costs should be paid, does not appear to have been complied with. *Ibid.*

5. A sheriff takes office and executes his bonds subject to the power of the Legislature to control its duties as the public good may require. The power which imposes the burden of taxation can legally indulge, mitigate, or suspend the assessment and collection of its revenues; and every collecting officer accepts office and gives bond affected with notice and subject to the exercise of this right of sovereignty. It enters into and becomes a part of the contract with the State and is as binding upon the bondsmen as any express condition of the bond. *Ibid.*

6. An action can be maintained by the clerk of a Superior Court in his own name upon the official bond of the sheriff, for the recovery of costs accrued in such court and collected by the sheriff, and due and payable to said clerk *and others*. *Jackson v. Maultsby*, 174.

7. The sureties on the official bond of a clerk of the Superior Court of New Hanover County, executed and conditioned according to the provisions of C. C. P., sec. 137, are liable in an action by the city of Wilmington to recover taxes collected by the clerk upon inspector's license under chapter 6, Private Laws 1870-71, although the bond was executed prior to the passage of the act. *Wilmington v. Nutt*, 177.

8. An action upon the official bond of a county treasurer (conditioned that he as treasurer and disburser of the school fund should well and truly disburse, etc., for the recovery of money belonging to the school fund of the county collected by him and not paid over, is properly brought in the name of the board of commissioners of the county. *Commissioners v. Magnin*, 181.

9. In such action, where the complaint alleged that "the said treasurer accounted with the plaintiffs concerning moneys which had come into his hands as said treasurer, and on such accounting was found to be in arrears and indebted to said county in the sum," etc., but failed to allege that any of the school fund or money ever came into the defendant's hands: *Held*, to be demurrable. *Ibid.*

10. An action upon the official bond of a county treasurer for the recovery of money due the county, collected by him and not paid over, is properly brought in the name of the board of commissioners of the county. *Ibid.*

11. In such action, where the complaint alleged the execution of the bond and that the defendant collected the money as treasurer, etc., and there was no allegation that the defendant was treasurer at any time not covered by the bond: *Held*, that the complaint substantially alleged that the money was collected during the term covered by the bond, and was sufficient. *Ibid.*

See Guardian and Ward, 1.

ORDINANCE. See Towns and Cities, 2.

PAROL EVIDENCE. See Evidence, 12.

PAROL PROMISE. See Contract, 8, 9.

PARTIES. See Action for Diverting Water, 4; Bill of Exchange, 3; Decree, 1, 2; Guardian and Ward, 2, 3; Official Bond, 8, 10; Practice, 1.

PARTNERSHIP.

1. On the trial of an action against B., upon an issue as to whether one W. and B. were partners, there was evidence that W. and B. were together, and had certain stock together; that B. carried a note to bank to be discounted, with a written request from W. that it should be done; that B. said that the money *was for himself and W.;* that they were *buying stock together*, and that the money was to be used in buying stock; that B. afterwards referred to the debt he and W. owed in bank, etc.: *Held*, that the jury were warranted in finding that a partnership existed between W. and B. *Dobson v. Chambers*, 334.

2. In such action, where it appeared that the partners requested the plaintiff to pay their debt in bank, and promised to repay him, and afterwards their note was taken up by certain accommodation acceptances, which the plaintiff took up with *his* note, which was thereafter paid by him: it was *Held*, that the plaintiff was entitled to recover; and the plaintiff's right to recover is not affected by the fact that he did not expressly contract to take up the defendant's note, or that a considerable period of time elapsed before he did so. *Ibid.*

PEACE WARRANT.

1. A peace warrant, in which is alleged no threat, nor fact or circumstance from which the court can determine whether the fear of the prosecutor is well founded or not, should be quashed. *S. v. Cooley*, 538.

2. In such case it was held to be error to tax the defendant with costs. *Ibid.*

See Costs, 2.

PERJURY. See Judge's Charge, 8.

PERSONAL PROPERTY EXEMPTION.

A. dies, leaving a widow and minor children (having devised his estate by will), and thereafter the widow dies, neither of them having applied for a homestead or personal property exemption: *Held*, that the minor children of A. are entitled to a homestead, but not to the personal property exemption. *Welch v. Macy*, 240.

PETITION FOR DOWER. See Widow.

PETITION FOR PARTITION.

Where a petition (filed by a guardian in the county court of Granville under the act of 1851-2, ch. 41) recited that the infant petitioners were tenants in common of a certain tract of land, that the same was not sufficient to be divided in kind among the petitioners without

PETITION FOR PARTITION—*Continued.*

materially injuring their pecuniary interests, and that their interest would be promoted by a sale and the placing of the funds arising therefrom so that they would be productive, and prayed for a sale and that the proceeds be paid to the guardian for the maintenance and support of the infant petitioners: *Held*, that it was substantially an application for a partition by sale, and within the power of the court under the act. *Allen v. Chappell*, 238.

PLEADING.

1. A complaint which contains a cause of action founded on contract and one for an injury to property (in tort) is demurrable under C. C. P., sec. 126. (Division of action under sec. 131, C. C. P., suggested.) *Doughty v. R. R.*, 22.
2. An action for a penalty, given by statute to any person injured, is an action on contract. *Ibid.*
3. An action to recover damages for illegally obstructing a navigable river is an action in tort. *Ibid.*
4. A complaint alleged that A. contracted to sell a lot of land to the defendant, and took his notes for the price, and afterwards A. conveyed the land to the plaintiff, who brought suit for the amount of the notes: *Held*, that the complaint is demurrable in that it failed to allege the assignment of the notes by A. to the plaintiff. *Pearce v. Mason*, 37.
5. An allegation of such assignment in the answer of the defendant supplies the omission and gives the plaintiff a good cause of action. *Ibid.*
6. When the defendant in such action in his answer alleges partial payments, including a certain sum for the occupation of the premises by the plaintiff, which allegation is denied in plaintiff's replication, and no issue thereon is submitted to the jury, this Court on appeal will arrest the judgment and remand the case in order that that issue may be tried by a jury. *Ibid.*
7. The general rule is that a party must present his defense in apt time by tender of issues, or else it must be held to be waived; but this rule should not be applied to a case wherein the complaint is not one on which a judgment can be given. *Ibid.*
8. Defects in complaints are sometimes held to be cured by verdict, but not in cases where there is a total omission of an essential allegation in the complaint. *Ibid.*
9. In such case the defect in the complaint could have been cured by an amendment after verdict under C. C. P., sec. 132. *Ibid.*
10. Where a complaint, in an action brought by legatees and devisees under the will of A. against the next of kin and heirs at law of A. (the executor of A. being dead and there being no administrator *d. b. n.* or administrator of the executor), alleged that A. died seized and possessed of a large number of tracts of land of large size (without otherwise describing them), located in four different counties and of great value, and possessed of large personal property and effects, all of which was directed to be sold by the executor; that the executor had fraudulently obtained releases from the plaintiffs of their interest in the estate (without describing the instruments of

PLEADING—*Continued.*

release or the interest of plaintiffs); that such of the lands as had not been sold by the executor had descended to the heirs at law, the defendants, who were therefore tenants in common with plaintiffs, and prayed for an account and settlement and partition: it was *Held*, that the complaint was demurrable. *Netherton v. Candler*, 88.

11. In such case it was error in the court below to overrule a demurrer to the complaint and allow the plaintiffs to amend; the demurrer should have been sustained, and the plaintiffs required to pay costs, and then it was within the discretion of the court to allow the plaintiffs to amend the complaint. *Ibid.*

12. In such case the action was properly brought to the Superior Court in term-time. *Ibid.*

See Practice, 17, 18, 24; Statute of Limitations, 6.

POSSESSION.

1. No length of constructive possession will ripen a defective title to land into a good one; the possession must be actual and continuous. *Williams v. Wallace*, 354.

2. Where there is no actual occupation of land shown, the law carries the possession to the real title. *Ibid.*

3. A possession of land under color of title must be taken by a man himself, his servants or tenants, and by him or them continued for seven years together. Therefore, where in an action to recover land it appeared that the plaintiff under color of title had made occasional entries upon the land at long intervals for the purpose at one time of cutting timber, at another of making bricks, etc.: *Held*, that the plaintiff was not entitled to recover. *Ibid.*

4. Where A. enters into possession of land, the property of B.'s wife under a deed from B. alone, the possession of A. is in law the possession of the wife and inures to her benefit. *Davis v. McArthur*, 357.

See Action to Recover Land.

PRACTICE.

1. One not a party to an action is not bound by any decree rendered therein; and this is so, although such person was originally a party plaintiff. *Owens v. Alexander*, 1.

2. In an action under the landlord and tenant act begun before a justice of the peace, and carried by appeal to the Superior Court, it was not error in the court to allow the defendant to file an answer claiming title in himself, and raising the question of the jurisdiction of the justice's court, although a motion to file such answer had been denied by the justice. *Lane v. Morton*, 7.

3. Where on the trial in the court below there were no objections to any part of the evidence and no exceptions to any part of his Honor's instructions, this Court on appeal can only affirm the judgment. *Bernard v. Johnston*, 25.

4. Process issuing from a court is not subject to amendment when third persons have acquired rights and the amendment is in such a matter that their rights would be affected by it. *Phillips v. Holland*, 31.

PRACTICE—*Continued.*

5. Where process issued to one county went into the hands of the sheriff of such county, who did not execute it or make any return upon it, and thereafter the same process was altered by the clerk who issued it originally, by directing it to the sheriff of another county: it was *Held*, that it was error in the court below to allow the process to be amended by restoring it to its original form. *Ibid.*

6. It is not error in a court to suspend the trial of an action in order to consider a motion to amend process in another case affecting the action on trial. *Ibid.*

7. In an action against an administrator upon a note executed by him for a debt of his intestate, when the intestate died 26 November, 1869, and administration was granted upon his estate 23 December, 1869, the Superior Court had jurisdiction to give judgment against the administrator only for the purpose of ascertaining the debt; it had no authority in such action to investigate his accounts or to fix him with assets by any judgment. *Holmes v. Foster*, 35.

8. It is error for a court upon the trial of an action to hand to the jury upon their retirement (when it is objected to) papers which have been read as evidence in the case. *Williams v. Thomas*, 47.

9. Where a railroad company instituted proceedings before a Superior Court clerk to condemn the defendant's land, and appealed to the Superior Court from the assessment of damages made by the commissioners as excessive; and upon a jury trial the amount of damages was reduced and judgment rendered therefor in favor of defendant: it was *Held*, that no part of the costs was taxable against the defendant. *R. R. v. Phillips*, 49.

10. Under Rev. Code, ch. 31, sec. 129, a summary judgment can be rendered in the probate court against the purchaser and his sureties on a note executed to secure the purchase money for land sold by an administrator for assets. *Chambers v. Penland*, 53.

11. The general guardian of infant defendants is the proper person upon whom service of process against such infants should be made. *Ibid.*

12. Irregularities in the preliminary proceedings in an action to sell land for assets are cured by the parties defendant coming in upon notice after a sale and consenting to its confirmation. *Ibid.*

13. The remedy of a defendant aggrieved by a judgment is not by injunction, but by an application to the court wherein the judgment was rendered, for relief. *Ibid.*

14. Under C. C. P., secs. 65, 66, a court has power to allow a judgment creditor of a corporation to interplead to an action in the nature of a *quo warranto* brought by the Attorney-General to annul and vacate the charter of the corporation. *Attorney-General v. Simonton*, 57.

15. In an action wherein certain creditors of an alleged bank, which had never organized under the terms of its charter, but under the ownership and control of one S. had done business in its corporate name, were plaintiffs in a creditors' bill, and the executrix of S. and certain other creditors who after the death of S. had obtained judgments against the bank and were seeking to collect them, were defendants, in which action the plaintiffs demanded that the judgments in favor of the defendants be declared void, that the supposed assets of the

PRACTICE—*Continued.*

bank be declared part of the estate of S., and that an account be taken, etc., and obtained an injunction in the court below restraining the defendant creditors from proceeding to collect their judgments and the defendant executrix from paying any of the debts of the bank or of her testator: it was *Held*, that the injunction should be continued until the hearing, a receiver of the bank assets appointed, and the issue of fact arising in the action submitted to a jury, unless by consent they should be submitted to a referee. *Dobson v. Simonton*, 63.

16. Where the defendant upon judgment being rendered against him in a justice's court appealed in open court, and afterwards told the justice not to send up the papers, who thereupon delayed so doing, and thereafter the defendant changed his mind and filed with the clerk of the Superior Court a bond sufficient to cover the plaintiff's claim and costs: *Held*, that it was not error in the court below to refuse to dismiss the appeal. *Suttle v. Green*, 76.

17. Where in an action brought by appeal to the Superior Court from a justice's court, the defendant alleged that his written answer filed in the justice's court was lost, and the court thereupon remanded the case to the justice, with leave to perfect the pleadings: *Held*, to be error. In such cases the court had the power, and it was its duty, to perfect the pleadings and proceed with the trial. *Faison v. Johnson*, 78.

18. In an action of claim and delivery for a horse, where the answer alleges a lien upon it, a demurrer to the answer does not admit the lien. It merely admits the facts set out in the answer, denying their sufficiency in law. *Mauney v. Ingram*, 96.

19. Where in such case the owner is dead, and the action is brought by his personal representative, a debt due defendant for feeding and taking care of the horse cannot be set up as a counterclaim. *Ibid.*

20. No error can be assigned in this Court on appeal which was not assigned in the court below, except (1) the want of jurisdiction in the court wherein the trial was had, and (2) that the complaint does not contain a sufficient cause of action. *Williamson v. Canal Co.*, 156.

21. No objection can be made to a deposition taken in an action, for any irregularity in taking the same, after the trial has begun; such objection should be taken by motion to quash the deposition before the commencement of the trial. *Katzenstein v. R. R.*, 286.

22. The exercise of the discretionary power of the court below, in allowing an amendment to the complaint during the progress of the trial, cannot be reviewed by this Court. *Dobson v. Chambers*, 334.

23. Where on the trial of an action in the court below a party objecting to the admission of evidence assigns an insufficient reason for the objection, he cannot on appeal to this Court assign a different reason in support of such objection. *Rollins v. Henry*, 342.

24. In an action to recover land, where the answer of the defendant denies the legal title of the plaintiff and sets up a legal title in himself, he is not at liberty to set up an equitable defense upon the trial. *Ibid.*

25. This Court will not undertake to supervise the discretionary powers of the court below over the argument of counsel, unless it clearly appears that such discretion has been abused. *S. v. Caveness*, 484.

PRACTICE—*Continued.*

26. Where on the trial of an indictment for larceny the counsel for the State below argued to the jury "that at some time or other possibly one of them might be compelled to have a suit for property upon which he relied for subsistence, and the person with whom he was in litigation might seize and detain it, as the defendant had done in this case; that they must remember that at some time one of them might be placed in the circumstances of the prosecutrix, and as they would expect justice themselves, so they must mete it out to the prosecutrix," when he was stopped by the court: *Held*, not to be error; the court could hardly have done less, and was not required to do more. *Ibid.*

27. An exception to improper remarks made by counsel in argument to a jury should specify *what was said;* otherwise, this Court cannot see that any prejudice resulted from the irregularity. *Ibid.*

28. On a trial for larceny, the counsel for the State in his argument to the jury said, "that if the judge had believed that the defendant had made out a fair claim to the property, he would have directed a verdict of acquittal without their leaving the box; but as he had not done so, the judge must not have believed that a fair claim to the property had been shown by the defendant"; this passed unnoticed by the judge then, and in his charge; when the jury returned with a verdict of guilty, and on being polled three of them did not concur, the judge informed them "that he had no opinion of his own, and that it was improper for the counsel so to have represented him": *Held*, to be error; the remarks of the counsel were improper, and the attempted correction of them by the court came too late. *Ibid.*

29. A motion by two or more defendants in an indictment for separate trials is within the discretion of the judge, and his action is not subject to review; so, also, is a motion to remove the cause to another county. *S. v. Lindsey*, 499.

30. It is not error for a juror to be withdrawn by the court and a mistrial entered in a criminal action, upon a motion of the solicitor, where the indictment is defective, and in such case the defendant can be tried upon another indictment. *S. v. England*, 552.

31. In the prosecution of criminal actions the solicitor is not restricted to the first bill of indictment found, but may at any time before entering upon the trial send another bill to the grand jury and require the defendants to answer that. *S. v. Dixon*, 558.

32. On the trial of a criminal action, where there are two or more defendants, and their defenses are separate and antagonistic, the court must regulate the order and manner in which the defenses are to be presented, and the exercise of such discretion is not reviewable in this Court. *Ibid.*

33. On the trial of a case in the court below, counsel cannot read to the jury in his argument an opinion of this Court delivered on an appeal from a former trial in the same case, detailing some of the facts of the case as they then appeared. *S. v. Smallwood*, 560.

See Action for Diverting Water, 5; Action to Recover Land, 2, 3, 5; Appeal, 1, 2, 3, 4, 6, 7; Arrest and Bail; Costs, 1, 2; Common Carrier, 2; Evidence, 7; Executors and Administrators, 1, 2; Guardian Bond,

PRACTICE—*Continued.*

2, 3; Imprisonment, 2; Indictment, 15; Injunction, 1, 2; Judge's Charge, 1, 9; Judgment, 1, 2, 4; Jury; New Trial, 1, 2; Peace Warrant; Pleading, 1, 6, 7, 8, 9, 11; Private Act; Referee, 1, 2, 3; Stay of Execution, 1, 2; Supplemental Proceedings; Trial; Wills, 12; Witness.

PRACTICE IN SUPREME COURT. See Imprisonment, 2; Jury, 1, 2; New Trial, 1, 2; Practice, 3, 22, 23, 25, 27, 32; Trial, 5.

PREMIUM NOTES. See Insurance, 2, 3.

PRESCRIPTION. See Action for Diverting Water, 2.

PRESUMPTION. See Fraud, 1, 2; Referee, 1.

PRESUMPTION OF GRANT. See Adverse Possession, 1.

PRIVATE ACT.

An agreement by counsel set out in the record, that the constitutional requirement of notice of the intended application to the General Assembly, for the passage of a private act, was not observed as to the act in dispute, cannot be accepted by the Court as conclusive. *Probably*, if it appeared either from the act itself or affirmatively from the journals of the Legislature, which would have been competent evidence in the court below, that such notice had not been given, this Court would hold the act to be unconstitutional. If the legislative journal is silent as to the fact, the presumption would be that the Legislature obeyed the Constitution. *Gatlin v. Tarboro*, 119.

PRIVIES. See Decree, 2.

PRIVILEGE TAX. See Construction of Statute.

PROCEEDINGS TO CONDEMN LAND. See Practice, 9.

PROCESS.

1. In an action against a railroad company, service of the summons upon a local agent of the company is sufficient to bring the defendant into court. *Katzenstein v. R. R.*, 286.
2. Where in such case notice of another proceeding in the action was served upon such local agent, it was held to be sufficient, in the absence of any allegation that thereby any injustice had befallen the defendant. *Ibid.*
3. Infant defendants cannot "accept service" of process. *Bass v. Bass*, 374.

See Practice, 4, 5, 6, 11.

PROHIBITION.

The Superior Courts have no power to issue a writ of prohibition. The Supreme Court has the sole jurisdiction to issue such writ. *Perry v. Shepherd*, 83.

PROMISE. See Statute of Limitations, 1, 2.

PROMISSORY NOTE.

A note executed in 1863, for the balance due upon a note executed in 1853 (such new note being given because of a lack of space on the old note for entry of a credit), is not subject to the legislative scale for Confederate money. *Cobb v. Gray*, 94.

See Contract, 1.

PROSECUTOR. See Costs, 2, 3, 4.

PUNISHMENT. See Costs, 3; Imprisonment.

PURCHASE. See Account and Settlement; Taxation, 2, 3.

PURCHASER.

1. Where land is purchased by a husband with his wife's money, the proceeds of the sale of her real estate, and title is taken to the husband alone, a resulting trust is created in favor of the wife, and a purchaser from the husband with notice stands affected by the same trust. *Lyon v. Akin*, 258.

2. Title derived by purchase at a sheriff's sale under a judgment not docketed in the county where the land lies, avails nothing against a purchaser for value from the defendant in the execution. *Rollins v. Henry*, 342.

3. Where one buys property pending an action of which he has notice, actual or presumed, in which the title to such property is in issue, from one of the parties to the action, he is bound by the judgment in the action just as the party from whom he bought would have been; and the rule also is (except as it may be qualified by C. C. P., sec. 90) that every person who buys property under such circumstances is conclusively presumed to have notice of the pending litigation. *Ibid.*

4. A purchaser at execution sale takes subject to all equities against the defendant in the execution, *whether he has notice of them or not. Ibid.*

See Homestead, 1; Purchase Money.

PURCHASE MONEY.

1. Where the plaintiff purchased and paid for the land in question, and had the deed made to the defendant J. under a verbal agreement that the plaintiff was to hold the deed, and that concurrently with taking the deed to J. he and his wife were to execute a mortgage to the plaintiff to secure the purchase money; J. did execute the mortgage, but his wife refused to join: *Held*, that the plaintiff was entitled to judgment for the amount due, and that the land be sold to satisfy it. *Held further*, that in such case no title vested in J., and his wife acquired no dower or homestead rights. *Held further*, that plaintiff's demand is for the purchase money, as against which homestead rights do not prevail. *Bunting v. Jones*, 242.

2. Where the plaintiff, having the equitable title to land, sold his interest therein to the defendant and procured a conveyance to him from the person holding the legal title: it was *Held*, that the defendant was

PURCHASE MONEY—*Continued.*

not entitled to a homestead against a judgment rendered on a note given by him to the plaintiff as part of the price of the land. *Suit v. Suit*, 272.

See Action to Recover Land, 1.

QUO WARRANTO. See Practice, 14.

RAILROAD COMPANIES. See Common Carrier; Master and Servant; Negligence; Practice, 9; Process, 1, 2.

RAPE.

An indictment for rape, which charges that the prisoner ". . . in and upon one N., in the peace of God and the State then and there being, violently and feloniously did make an assault, and her the said N. then and there violently and against her will did ravish and carnally know," etc., is sufficient. *S. v. Laxton*, 564.

See Evidence, 22; Judge's Charge, 4; Trial, 3, 4, 5.

RECEIVER. See Practice, 15.

RECEIVING STOLEN GOODS. See Larceny, 3.

REFEREE.

1. If there is *no* evidence to support the findings of fact reported by a referee, they will not be sustained; they are presumed to be right unless *shown to be wrong*. *Green v. Jones*, 265.
2. An exception to the report of a referee should discriminate and point out specifically the faults complained of. An exception "that the referee ought to have found as a conclusion of law that the plaintiff recover nothing," is not sufficient. *Suit v. Suit*, 272.
3. Where the defendant in his answer set up an itemized counterclaim, and the referee reported as to only *one* item, and the defendant excepted because "the facts from which the conclusions of law are drawn are not found with sufficient distinctness and certainty to warrant them," and also because "there are certain material issues raised by the pleadings and sustained by the evidence which the referee has not set forth": *Held*, that the exceptions are not sufficiently distinct, and the Court will *infer* that the referee passed upon all the items, and rejected the one allowed. *Ibid.*

REGISTRATION. See Crop Lien; Deed.

RELEASE. See Mortgage Sale, 2.

RELIGIOUS CONGREGATION (Disturbing). See Indictment, 2, 3, 4, 5, 6, 7.

REMAINDER. See Wills, 3, 4, 8.

REMOVAL OF CAUSE. See Practice, 29.

REMOVAL OF EXECUTOR. See Executors and Administrators, 1, 2.

REPEAL OF STATUTE. See Indictment, 21, 22.

RESULTING TRUST. See Purchaser, 1.

RIPARIAN PROPRIETOR. See Action for Diverting Water, 1, 2.

SALE OF LAND. See Account and Settlement; Action to Recover Land, 6; Indictment, 10; Purchase Money, 1, 2.

SALE OF LAND FOR ASSETS. See Practice, 10, 12.

SATISFACTION OF JUDGMENT. See Judgment, 3.

"SCALE." See Promissory Note.

SCHOOL FUND. See Official Bond, 8, 9.

SEPARATE TRIAL. See Practice, 29.

SERVICE OF PROCESS. See Process.

SHERIFF. See Justice of the Peace, 4; Official Bond, 1, 2, 3, 4, 5, 6.

SHERIFF'S DEED. See Action to Recover Land, 6; Evidence, 5.

SOLICITOR. See Witness.

SPECIAL PROCEEDING. See Practice, 10, 11, 12.

SPECIFIC DESCRIPTION OF GOODS. See Warranty, 2, 3.

SPIRITUOUS LIQUORS. See Taxation, 2, 3.

STATUTE OF LIMITATIONS.

1. A promise by M. that "he would see his brother and would pay the debt" is sufficient to remove the bar of the statute of limitations. *Kirby v. Mills*, 124.
2. A promise (relied on to avoid the statute of limitations) made to an attorney is in law a promise made to the principal, and can be declared on as such. *Ibid.*
3. In an action to recover damages for the conversion of personal property, the defendant pleaded the statute of limitations: *Held*, that the force and effect given by the statute to the lapse of time cannot be defeated by proof that the plaintiff did not know of the defendant's act of conversion, or that the defendant fraudulently concealed the same. *Blount v. Parker*, 128.
4. In such action, where it appeared that in 1865 a safe in which were certain bonds belonging to the plaintiff's intestate was broken open by Federal troops, and most of the bonds stolen or destroyed, and that defendant found three of them in the public street, and took possession of them; and afterward, in 1875, the plaintiff ascertained that the defendant had possession of the bonds, and demanded them, notifying the defendant that they belonged to the estate of his intestate, and defendant refused to surrender them, but in a few weeks thereafter sold them and converted the proceeds, whereupon the plaintiff brought this action: it was *Held*, that the action was barred by the statute of limitations. *Ibid.*

STATUTE OF LIMITATIONS—*Continued.*

5. In such case the provisions of C. C. P., sec. 34, do not aid the plaintiff, even if his cause of action had accrued since the adoption of The Code. *Ibid.*
6. When the statute of limitations is relied upon as a defense, it can be taken advantage of only by answer. *Kahnweiler v. Anderson*, 133.

See Bill of Exchange, 6; Contract, 3, 9; Stay of Execution, 2.

STATUTORY OFFENSE. See Indictment, 17, 21, 22.

STAY LAW.

The act of 1860, first extra session, ch. 16 (known as the first stay law), is unconstitutional and void. *Lyon v. Akin*, 258.

STAY OF EXECUTION.

1. One who signs a stay of execution upon a justice's judgment as surety becomes thereby a party to the judgment, and is bound to the same extent and in like manner as his principal. *Barringer v. Allison*, 79.
2. In such cases the statutory bar of *seven* years (Rev. Code, ch. 65, sec. 6) applies to an action brought against the surety upon the judgment. *Ibid.*

SUBSTANTIVE EVIDENCE. See Evidence, 7; Judge's Charge, 3.

SUFFICIENCY OF AFFIDAVITS. See Arrest and Bail; Executors and Administrators, 2.

SUMMARY JUDGMENT. See Practice, 10.

SUMMONS. See Process, 1.

SUPPLEMENTAL PROCEEDINGS.

1. A judgment creditor whose execution has been returned unsatisfied cannot maintain an *action* against an administrator to subject a distributive share of the judgment debtor in the estate to the satisfaction of the debt; he must proceed by *supplemental proceedings*. *Rand v. Rand*, 12.
2. Proceedings supplemental to execution under C. C. P. are a substitute for the former creditors' bill, and are governed by the principles established under the former practice in administering this species of relief in behalf of judgment creditors. *Ibid.*

SUPREME COURT PRACTICE. See Imprisonment, 2; Jury, 1, 2; New Trial, 1, 2; Practice, 3, 22, 23, 25, 27, 32; Trial, 5.

SUPERIOR COURT. See Practice, 7.

SURETY AND PRINCIPAL. See Official Bond, 1, 2, 3, 4, 5, 6; Stay of Execution, 1, 2.

TAXATION.

1. A tax levied by a municipal corporation of 2 per cent on real estate, excluding from valuation and taxation the stocks of goods owned

TAXATION—*Continued.*

by merchants, is obnoxious to Article VII, sec. 9, of the Constitution, as not being *uniform;* and the fact that the corporation added to the tax on the *monthly sales* of said merchants more than enough to compensate for the deficiency caused by said exclusion does not alter the case. *London v. Wilmington,* 109.

2. A dealer in spirituous liquors, etc., in listing the amount of his purchases for taxation under the revenue act (Laws 1876-7, ch. 156, sec. 10), is not entitled to deduct therefrom the amount of the United States internal revenue tax upon said purchases. *Lehman v. Grantham,* 115.
3. Liquors, etc., subject to the United States internal revenue tax cannot be *purchased* before they are properly stamped. *Ibid.*
4. A tax is *uniform* when it is equal upon all persons belonging to the described class upon which it is imposed. *Gatlin v. Tarboro,* 119.
5. A tax levied quarterly by a town, under authority of an act of the General Assembly, upon all traders doing business in the town, "of $1 for every $1,000 worth of goods sold during the preceding quarter," is uniform and constitutional. *Ibid.*

See Construction of Statute; Injunction, 1, 2.

TAXES. See Official Bond, 1, 2, 3, 4, 5, 7.

TOWNS AND CITIES.

1. A chief officer of a city or town has the same criminal jurisdiction within the corporate limits as is given to justices of the peace; but the statutory requisites which confer final jurisdiction must be complied with. *Greensboro v. Shields,* 417.
2. A prosecution under a city ordinance must fail if no ordinance is set out in the proceedings as having been violated. *Ibid.*

See Injunction, 1, 2; Taxation, 1, 4, 5.

TRIAL.

1. A judge in his charge to a jury is not required to recapitulate collateral evidence testified to on the trial. *S. v. Caveness,* 484.
2. It is too late after verdict to except to the omission of the court to recapitulate to the jury any evidence adduced on the trial. *Ibid.*
3. On a trial for rape, the prosecutrix, while testifying as to the circumstances of the crime, hesitated and wept; whereupon the court directed her to proceed, saying, "You need not use language that will shock your modesty": *Held,* not to be error. *S. v. Laxton,* 564.
4. On such trial, the mother of the prosecutrix, while testifying before the jury, held down her head, seemingly much affected, and spoke in a low voice; prisoner's counsel thereupon asked the court to require her to hold up her head and speak louder; the court declined to compel the witness to hold up her head, but said that she would be required to speak loud enough to be heard, at the same time remarking to counsel that "some allowance must be made for the woman, as she was overcome with emotion": *Held,* not to be error; such a remark was not an invasion of the province of the jury within the purview of C. C. P., sec. 237. *Ibid.*

TRIAL—*Continued.*

5. During such trial certain members of the family of the prosecutrix sat within the bar, and occasionally wept during the argument of the prosecuting counsel, and withdrew when the prisoner's counsel addressed the jury: *Held*, that any action in the matter was within the sound discretion of the presiding judge, and not subject to review in this Court. *Ibid.*

See Action to Recover Land, 4; Homicide, 5; Practice, 6, 8, 9, 21, 24, 29, 30, 31, 32, 33.

TRUSTS AND TRUSTEES. See Account and Settlement; Fraud, 1, 2; Purchaser, 1.

UNCONSTITUTIONAL JUDGMENT. See Imprisonment, 1.

UNIFORM TAXATION. See Taxation, 1, 4, 5.

UNITED STATES INTERNAL REVENUE TAX. See Taxation, 2, 3.

VENDOR AND VENDEE.

1. As soon as an order for goods is accepted by the vendor, the contract is complete without further notice to the vendee; and such contract is fully performed on the part of the vendor by the delivery of the goods in good condition to the proper carrier. *Ober v. Smith*, 313.
2. A delivery to a carrier designated by the vendee is of the same legal effect as a delivery to the vendee himself; if no particular route or carrier is indicated by the vendee, it is the duty of the vendor to ship the goods ordered "in a reasonable course of transit." *Ibid.*
3. The fact that no bill of lading was sent to the vendee does not affect the right of the vendor to recover the price of the goods. *Ibid.*

See Warranty.

VENUE. See Guardian Bond, 2, 3.

VERBAL ORDER OF JUSTICE. See Indictment, 8; Justice of the Peace, 4.

VERDICT.

The ungrammatical findings of a jury do not vitiate a verdict when the sense is clear; and where in this action the jury found that defendant H. agreed with the plaintiff to purchase the property, and that the defendant S. was a party to the contract, there is no room for a misconstruction of the verdict. *Pepper v. Harris*, 71.

See Action to Recover Land, 6; Appeal, 7; Mortgage, 2; Pleading, 8, 9.

WAIVER. See Insurance, 5; Warranty, 2.

WARRANTY.

1. Where L. purchased of R. a certain number of barrels of rosin, under the following contract, viz.: "Received of L. $700, in part payment of 500 barrels of strained rosin, to be delivered," etc., and thereupon at the place of delivery L. examined and selected the number of barrels purchased from a lot of barrels largely in excess of the

WARRANTY—*Continued.*

amount purchased; and the barrels so selected afterwards proved in a great measure not to be "strained rosin": it was *Held*, that the agreement of R. to deliver, etc., amounted to a warranty on his part that the rosin received by L. should be *strained rosin. Lewis v. Rountree*, 323.

2. In such case the fact that L. had an opportunity to inspect the rosin before or when it was delivered, and did in fact select the particular barrels purchased, did not amount to a waiver of the warranty that they should be of the specific description. *Ibid.*
3. Where goods are warranted to come within a specific description, the vendee is entitled, although he does not return them to the vendor or give notice of their failure to come within the description warranted, to bring an action for breach of warranty. *Ibid.*

WIDOW.

1. Where a widow does not dissent from her husband's will, there is no prescribed time within which she must apply for dower; and where she does not dissent and makes no application adverse to her rights under the will, there is no statute and no principle of the common law which bars her right of dower or its equivalent in the lands of her husband. *Simonton v. Houston*, 408.
2. The statute (Rev. Code, ch. 118, sec. 8) secures to a widow a provision out of the lands of her husband in two cases, viz.: (1) where dower is actually assigned, (2) where the husband devises lands to the wife which are presumed to be in lieu of dower. *Ibid.*
3. Where the plaintiff, in a petition for dower, had qualified as executrix under the will of her husband (by which the whole estate, real and personal, was devised to her) and exercised the duties of the office for sixteen months, when, ascertaining that the estate was insolvent, she instituted this proceeding against the creditors of the estate: it was *Held*, that she was entitled to have allotted to her for life such portion of the lands of her husband as she would have been entitled to if he had died intestate. *Ibid.*
4. Although no proceeding has been provided by statute for a case where a widow claims the equivalent for dower in the lands of her husband devised to her under his will, yet by analogy she is entitled to the same remedies as are provided in an application for dower. *Ibid.*

See Personal Property Exemption.

WIFE'S INTEREST. See Action to Recover Land, 1; Purchaser, 1; Purchase Money.

WILLS.

1. Where a testatrix bequeathed a certain sum each to her two sisters, M. and N., "and in the event of the death of either without *natural heirs*, the amount I have bequeathed shall go to the survivor": *Held*, that the words "natural heirs" mean children or issue; and upon the death of M. without issue, the bequest to her goes to N. *Miller v. Churchill*, 372.
2. A testator by his will gave his entire estate to his wife, "to be disposed of by will or in any manner she may deem best"; the wife died,

leaving the property undisposed of: *Held*, that under the will she acquired an absolute estate in the property, and at her death it descended to *her* heirs and distributees. *Bass v. Bass*, 374.

3. Where personal property is bequeathed for life, with remainder over, and the bequest is not specific in terms, and there is nothing in the will to show an intention or preference that the life tenant shall enjoy the specific property left, and in the form in which it is left, it must be converted into money as a fund to be held and applied to the benefit of all by paying the interest to the legatee for life and the principal to the remainderman. *Ritch v. Morris*, 377.

4. A testator, by his will, bequeathed certain personal property, consisting of stock, crops, furniture, cash on hand, notes, etc., "to my daughters H. and F., to each of them during the term of their natural life, and at the death of each to descend to the children of each, share and share alike; my said daughters during life to use the profits arising or accruing from their estate respectively, and to inure to their sole, separate, and exclusive use and benefit, and at the death of each to descend as aforesaid": *Held*, that the executor should sell the personal property and pay over the interest on the fund so acquired (after paying debts) to the legatees annually and the principal to their children at the death of said legatees; and further, that the legatees were entitled to an account in order that the fund might be definitely ascertained. *Ibid.*

5. A testatrix by her will bequeathed to her niece R. for her life the annual interest upon $4,000, and gave to D. one acre of land and certain small articles of personal property, and then gave the whole of her estate, "subject to the devises and bequests herein otherwise made," to her brother J. in fee, in case he should be solvent at the time of her death, and if not, then to him in trust, etc., stating that "this provision includes the whole of my estate of every character, both real, personal, and mixed." Afterwards the testatrix made a codicil to the will, by which she gave the $4,000 to R. absolutely, and also gave certain other pecuniary legacies to her three sisters. Thereafter she made another codicil, "not wishing my real estate to be in any manner liable for the debts of my brother J., etc., I devise to my nephew T. all my land and other real estate, in trust for his mother during the life of J., and then to him (T.) and his heirs male in fee simple," etc. The personal estate of the testatrix, although at her death nominally ample to pay off the pecuniary legacies mentioned in the first codicil, proved to be insufficient for that purpose: *Held*, that the pecuniary legacies mentioned in the first codicil are a charge upon the real estate devised to T. *Devereux v. Devereux*, 386.

6. The legal effect of the words in the will, "subject to the devises and bequests herein otherwise made," is the same as if those devises and bequests had been directed to be taken out of the estate and the residue given to J. *Ibid.*

7. The testatrix, by enlarging her bounty to R. in the first codicil, did not intend to withdraw or impair the security provided for its payment; and the additional legacies are within the words of the will and protected equally with the annuity to R. and the legacy afterwards substituted for it, and the second codicil was not made to

WILLS—*Continued.*

disturb the relations previously existing between the different objects of the testatrix's bounty or the value of their respective interests under the will. *Ibid.*

8. Where land was devised to O. in trust for two of the testatrix's daughters during their natural life, to be equally divided, and after the death of either, in trust in part for her three grandchildren, until the death of the other daughter, "at which time" said land is to be "equally divided" between the said three grandchildren, of whom the defendant P. was one: *Held*, that the interest of P. in the land was a vested remainder, and liable to sale under execution during the term of the life tenants. *Ellwood v. Plummer*, 392.

9. A testator by his will devised that "the plantation that my son G. now lives on, lying in Burke County, 350 acres, to be sold . . . and the balance of the said land joining G.'s plantation where he now lives in Burke County to be equally divided with my three sons J., H., and G." The testator had three adjoining tracts of land in Burke County, containing respectively 400, 70, and 200 acres, the first two of which had been cultivated by G. for many years: *Held*, that under the will the entire plantation, containing the first two tracts (470 acres) should be sold; the words "350 acres" being only an accumulative description of the property, and not of the amount of land intended to be sold. *Jones v. Robinson*, 396.

10. It is a well settled rule of construction that where there is in the first place an unambiguous and certain description of the thing, and afterwards another description which fails in certainty, the latter must be rejected. *Ibid.*

11. On the trial of an issue of *devisavit vel non*, the burden is upon the caveator to prove the insanity of the testator. *Mayo v. Jones*, 402.

12. On such trial the propounder has the right to open and conclude, the burden of proving the formal execution of the will being upon him. *Ibid.*

13. Moral debasement is not necessarily and of itself insanity. *Ibid.*

See Costs; Personal Property Exemption; Widow.

WITHDRAWAL OF JUROR. See Practice, 30.

WITNESS.

It is error to permit the solicitor for the State to testify in a criminal trial without being sworn. *S. v. Smith*, 462.

See Evidence, 10; Trial, 3, 4.

This book must
not be taken
from the building